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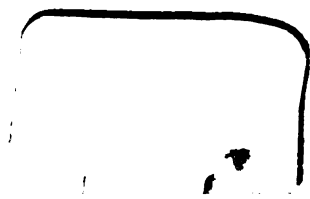
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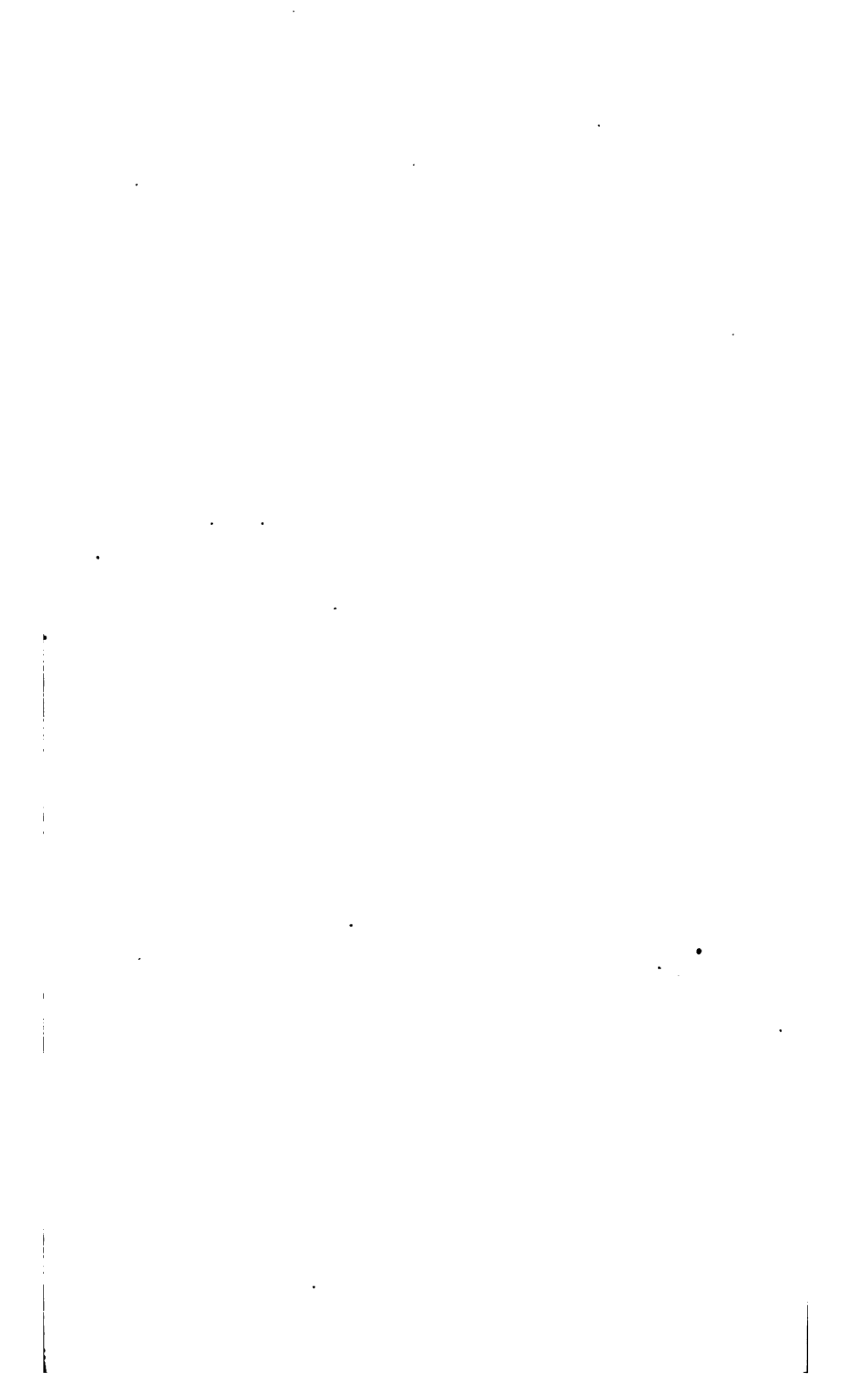




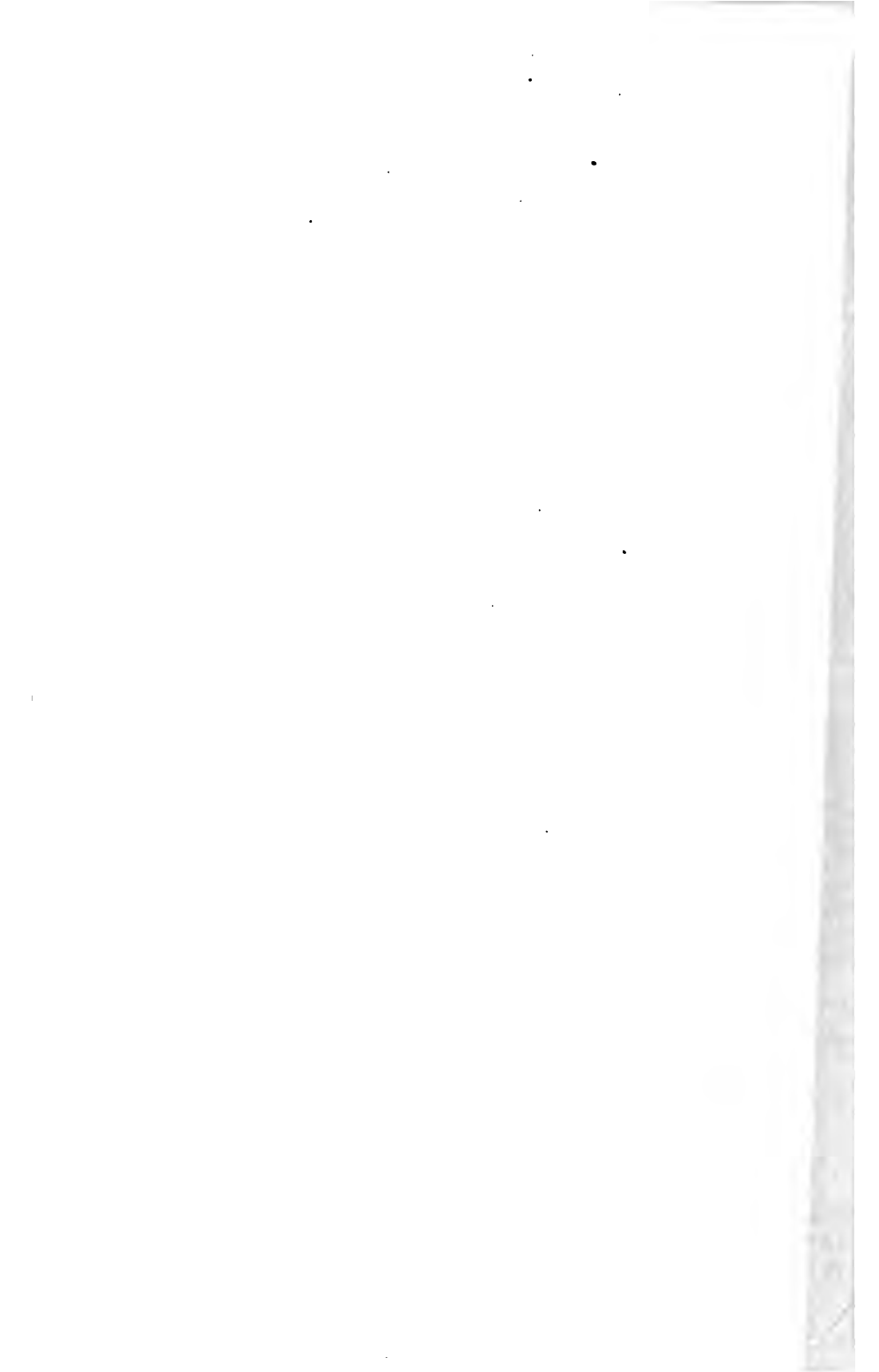


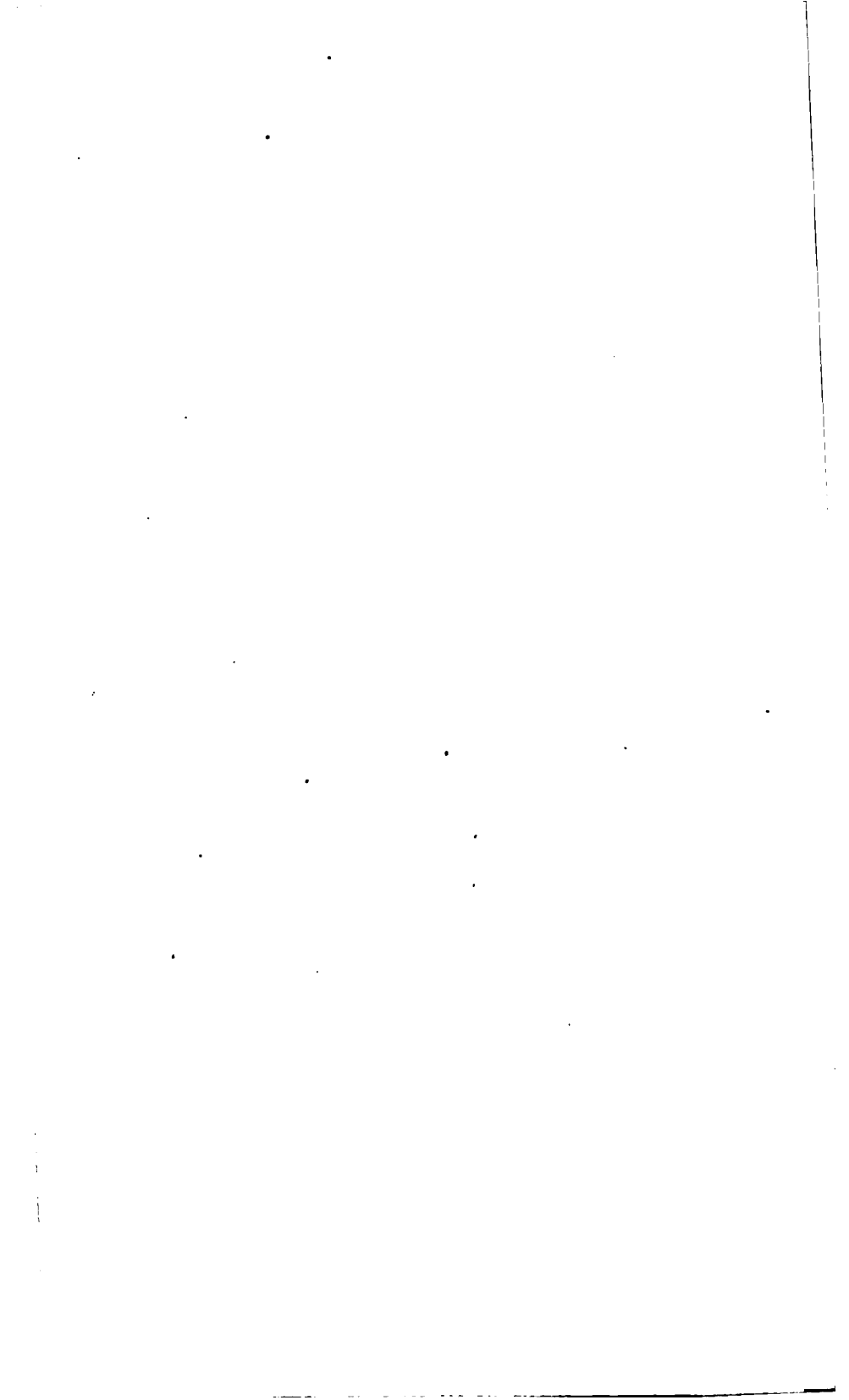












# REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

*District Courts of the United States*

WITHIN THE SECOND CIRCUIT.

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BY ROBERT D. BENEDICT.

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VOLUME II.

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# UNITED STATES

## DISTRICT COURT REPORTS.

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NOVEMBER, 1867.

### THE PHILADELPHIA AND READING RAILROAD COMPANY *v.* WILLIAM L. NORTHAM.

#### BILL OF LADING.—DEMURRAGE.—USAGE.—INTEREST.

Where a bill of lading specified that the vessel was bound "for Catharine street, East River, New York," and also contained a clause as follows: "demurrage \$10 a day after four days," and, on the arrival of the vessel at Catharine street, it was not possible to discharge her there, owing to the wharf being out of repair, and the consignee thereupon ordered her to go to Dover street, and she went and was unable to discharge her cargo, owing to there being so many vessels there that she could not get a berth, until thirteen days had elapsed; and where another bill of lading between the same parties described the boat as "bound for New York, instructions at New Brunswick," and had a similar provision as to demurrage, and the consignee sent her instructions at New Brunswick to go to Dover street, whither she went and was detained for the same cause for sixteen days; and the owners of the boats sued the consignee for demurrage, and he set up that, by usage, the clause as to demurrage meant that the boat should only be entitled to demurrage, if detained more than four days after she had got a berth:

*Held*, That where the consignee of a cargo requires it to be taken to a particular place, he ought to be held liable for any delay caused at that place, for which the vessel cannot be shown to be directly chargeable;

That no usage ought to be allowed to vary a plain contract for demurrage, under such circumstances;

That the consignee, therefore, was bound to pay demurrage after four days from the arrival of the vessel at the specified place of delivery, with interest on it from the day when it was demanded.

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The Philadelphia and Reading Railroad Company v. Northam.

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This was a libel to recover freight and demurrage on two cargoes of coal, shipped from Philadelphia to New York, on board of canal boats belonging to the libellants, one by boat No. 58, and the other by boat No. 75, under bills of lading signed therefor by the masters of the boats. In the case of No. 58, the boat was described in the bill of lading as "bound for Catharine street, East River, New York;" the quantity of coal was 204 tons; and the bill of lading engaged to deliver the coal to the respondent, he paying freight at \$1.60 per ton, and "demurrage \$10 per day after four days." In the case of No. 75, the boat was described in the bill of lading as "bound for New York, instructions at New Brunswick;" the quantity of coal was 215 tons; and the bill of lading engaged to deliver the coal to W. J. Harlan or his assigns (the respondent being the assignee), he or they paying freight at the rate of \$1.60 per ton, "demurrage \$10 per day after four lay days." No. 58 arrived at Catharine street, and her arrival was duly reported on the same day by her captain to the respondent, who ordered her to go to Dover street, where she was detained in all for thirteen lay days after her arrival was so reported. The libellants claimed nine days' demurrage. The detention was caused by her being obliged to wait her turn at Dover street for a berth to discharge her cargo. No. 75 received instructions at New Brunswick from the respondent to go to Dover street, New York, and went there, and her arrival was reported to the respondent, and she was thereafter detained there, waiting for a berth and discharging, for sixteen lay days, for which the libellants claimed twelve days' demurrage. The answer set up that, when No. 58 arrived at Catharine street, the pier there could not be used to discharge cargoes, because it had been closed by the public authorities as out of repair; that for the mutual benefit of both parties, and by agreement, the boat was taken to Dover street and discharged; that she was discharged as soon after she

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The Philadelphia and Reading Railroad Company v. Northam.

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arrived at Dover street as a berth could be obtained ; that she was fully discharged within three days after she obtained a berth ; that, by an established and well known custom, the lay days referred to in the bill of lading did not begin to run till the boat had obtained a berth ; and that the captain of the boat did not offer to deliver the coal till he had obtained a berth. The answer also set up that No. 75 was instructed at New Brunswick to go to Dover street ; that she commenced discharging as soon after she arrived there as she could obtain a berth, and was fully discharged within three days thereafter ; that the custom before mentioned existed ; and that the captain of the boat did not offer to deliver the coal till he had procured a berth.

For libellants, *Benedict, Tracy & Benedict*.

For respondent, *C. Morris*.

BLATCHFORD, J. In regard to No. 58, she was bound by the contract to go to Catharine street. She went there and was then ordered by the respondent to go to Dover street, and she then went there. Undoubtedly, the respondent ordered her to the place where he thought she could be most quickly discharged. But, by the contract, the whole duty of the libellants was discharged in taking the cargo to Catharine street, and notifying the respondent of its arrival, and awaiting his orders. This was done. The plain interpretation of the provision of the contract, "demurrage \$10 per day, after four days," is demurrage \$10 per day, after four days from the time the vessel arrives at Catharine street with the cargo, and her captain notifies the respondent of his arrival. So, too, No. 75 was bound to go to the place where she should receive instructions at New Brunswick to go, and it being shown that she was at New Brunswick instructed to go to Dover street,

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The Philadelphia and Reading Railroad Company v. Northam.

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the contract stands as if Dover street had been originally inserted in it as the place of destination. Her arrival at Dover street having been notified by her captain, the same observations apply as in the case of No. 58.

The proof as to a custom or usage, that the words, "after four days," and "after four lay days," mean, "after four lay days from and after the time when the boat gets a berth, so that she can commence discharging her cargo," does not establish any such custom or usage. The burden of proving such a custom is on the respondent, and he has failed to make out any such custom. Besides, I do not think the evidence as to such a custom has any reference to bills of lading like those in this case, where, by the terms of the contract, the cargo is to be delivered at a particular place. It might, perhaps, apply to a contract where the cargo was deliverable generally at New York. The usage, if made out and applied to bills of lading like those in this case, would throw on the owner of the vessel the loss by delay in getting a berth, when he had no discretion as to the selection of one, but was bound to deliver at a particular dock. This would be unreasonable. Where the contract is for delivery generally at New York, there ought to be a propriety in throwing on the owner of the vessel the burden of finding a place to discharge the cargo, and in holding that the days allowed to discharge it, by the contract, did not begin to run till the place had been found, so that the consignee could actually receive the cargo, and in allowing evidence of a custom to that effect. But, where the consignee of the cargo requires it to be taken to a particular place, he ought to be held liable for any delay caused at that place, with which the vessel cannot be shown to be directly chargeable, and no usage ought to be allowed to vary a plain contract to that effect.

In the present case, it is shown, in regard to No. 58, that the respondent was notified, two days before the boat arrived at Catharine street, that it would be impos-

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In the Matter of Julius Schick, an Involuntary Bankrupt.

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sible for her to discharge there because of the condition of the dock, and that there was then abundant time for him to have sent instructions to the boat at New Brunswick, ordering her to go to Dover street, and that, if he had done so at that time, instead of waiting until she arrived at Catharine street, she would have got a berth at Dover street several days sooner than she did, and probably, on the evidence, soon enough to have caused no delay beyond the four days after her arrival at Dover street, and thus there would have been no claim for demurrage. Therefore, in any aspect of the case, the respondent would be chargeable with the delay in discharging No. 58.

The libellants are entitled to a decree for \$90 demurrage on No. 58, being for nine days, at \$10 per day, and for \$120 demurrage on No. 75, being for 12 days, at \$10 per day, with interest thereon from the date when a demand was made for it.

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NOVEMBER, 1867.

## IN THE MATTER OF JULIUS SCHICK, AN INVOLUNTARY BANKRUPT.

### FICTITIOUS JUDGMENT.—ACT OF BANKRUPTCY.

Where a debtor, before the passage of the Bankruptcy Act, procured a fictitious judgment to be entered in a State court against himself, to enable him to coerce creditors who were pressing him, and, after the passage of the Act, took no steps to have it set aside, and in October, 1867, the debtor being then insolvent, execution was issued on it to a sheriff, who levied on what was substantially all the property of the debtor:

*Held*, That the inaction of the debtor, in taking no steps to set aside the fictitious judgment, and to prevent execution being issued on it, was a procuring or suffering by him of his property to be taken on legal process;

That the transaction was, in effect, within the provisions of section thirty-nine of

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In the Matter of Julius Schick, an Involuntary Bankrupt.

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the Bankruptcy Act, a transfer of the debtor's property, with intent to delay, hinder and defraud his creditors ;

That the debtor, therefore, must be adjudicated a bankrupt ; but there was nothing in the adjudication to preclude the judgment creditor from asserting his rights, and maintaining the integrity of the judgment, if he could.

BLATCHFORD, J. The debtor, having denied the acts of bankruptcy set forth in the petition, evidence has been taken orally before the court, on the part of the petitioners and the debtor. The only act of bankruptcy set forth in the petition, which it is important to consider, is that arising out of the judgment obtained by Raphael I. Cowen against the debtor, on the 16th of February, 1867, for \$2,005.51, in the Supreme Court of New York, for the city and county of New York. On that judgment an execution was issued, soon after the judgment was recovered, but it was almost immediately countermanded by Cowen, and nothing further was done in regard to the judgment until the 18th of October, 1867, when a second execution was issued upon it to the sheriff of the city and county of New York, under which the sheriff has levied upon the stock of cloths and clothing contained in the debtor's store, in the Third avenue, in the city of New York, and now holds the same. The property so levied upon is substantially all the property which the debtor has. It is alleged, on the part of the petitioning creditors, that this judgment is wholly fictitious and fraudulent, and that the debtor did not owe Cowen anything, and that the judgment was procured by the debtor to be recovered for the purpose of covering up his property from liability to be seized by his creditors. The portions of section thirty-nine of the Bankruptcy Act, under which it is sought to have the debtor adjudged a bankrupt in this case, are the provisions, that any person residing within the jurisdiction of the United States, and owing debts provable under the Act, exceeding the amount of three hundred dollars, who, after the passage of the Act, being insolvent, shall



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In the Matter of Julius Schick, an Involuntary Bankrupt.

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procure or suffer his property to be taken on legal process, with the intent, by such disposition of his property, to defeat or delay the operation of the Act, and any such person who shall make any transfer of his property, with intent to delay, hinder, or defraud his creditors, shall be deemed to have committed an act of bankruptcy, and, subject to the conditions thereafter prescribed, shall be adjudged a bankrupt, on the petition of one or more of his creditors, the aggregate of whose debts provable under the Act amount to at least two hundred and fifty dollars, provided such petition is brought within six months after the act of bankruptcy shall have been committed.

I am satisfied, from the evidence, that the debtor was insolvent when the execution was issued, on the 18th of October, 1867, on the judgment recovered by Cowen, and when the property of the debtor was taken by the sheriff on such execution. All the minor conditions required by the provisions cited exist in regard to the debtor. The only disputed question is as to the *bona fides* of the judgment. In regard to that, I am compelled to come to the conclusion, that the judgment was wholly fictitious, and was a device set on foot by the debtor to enable him to coerce creditors of his, who were pressing him at the time, to make favorable arrangements with him and give him time, and that he did not owe Cowen anything at the time the judgment was recovered. Although the debtor and Cowen both of them swear to the *bona fides* of the debt to Cowen, and of the judgment, yet it is proved, by four separate and credible witnesses, that, on as many different occasions, the debtor declared to each of them, in substance, that the judgment was a fiction, and was procured to protect his property, and that he owed Cowen nothing. The debtor, although examined as a witness, did not deny having so stated to them, nor did he attempt to give any explanation in regard to such statements. Moreover, there are

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In the Matter of Julius Schick, an Involuntary Bankrupt.

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many surrounding and collateral circumstances in the evidence pointing in the same direction. Although the Bankruptcy Act had not been passed when the judgment was recovered, yet it was in force when the property of the debtor was taken on the execution, and the inaction or non-action of the debtor, in taking no steps to set aside the fictitious judgment, and prevent a second execution from being issued on it, must be held to have been, under the circumstances, a procuring or suffering by him of his property to be taken on legal process. The consequence of the taking of such property on the execution must be held to involve a probable defeat or delay of the operation of the Bankruptcy Act, and the debtor must be held to have intended such consequence, by procuring or suffering his property to be so taken. I think, also, that the transaction was, in substance and effect, within the provisions of section thirty-nine, a transfer of the property of the debtor, made by him, and so made with intent to delay, hinder and defraud his creditors.

It follows, that the debtor must be adjudged a bankrupt. This proceeding, however, is, so far, one merely between the petitioning creditors and the debtor. Cowen is no party to it, although examined as a witness for the debtor; and, in the further progress of the matter, if the assignee of the debtor, to be appointed, should institute proceedings to realize, for the benefit of the debtor's estate in bankruptcy, the property levied on by the sheriff under the execution, Cowen will have a full opportunity to assert his rights, and maintain, if he can, the integrity of the judgment; and there is nothing in this adjudication to preclude him from doing so.

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McLoon v. Linquist.

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NOVEMBER, 1867.

**WILLIAM McLOON AND WILLIAM GRANT v.  
MAURICE F. LINQUIST ET AL., COMPOSING  
THE FIRM OF LINQUIST, NORTON & CO.****EQUITABLE ASSIGNMENT.—GARNISHEE.**

It is the law of the courts of the United States, that, where an order is drawn either on a general or a particular fund, it does not amount to an assignment of that part, or give a lien as against the drawee, unless he consents to the appropriation, by an acceptance of the draft, or an obligation to accept may be fairly implied.

Where a firm had chartered a vessel for a voyage to New Orleans, and obtained advances on the bills of lading of her cargo from T., who took them under an agreement that the cargo should be sold in New Orleans by D., and the whole proceeds remitted to T., who was to take his advances out of it and pay the rest over to the firm, and the firm, being indebted to other parties, gave them a draft on D., "payable out of proceeds of consignment" by the vessel, which draft was not accepted, but D. gave T. notice of of its presentation; and where, in a suit by the owners of the vessel, to recover the charter money, an attachment was served on T., who afterwards received the proceeds of the cargo from D., and, claimed the right to reimburse himself therefrom for his advances, and for the amount of the draft, which he had paid after receiving such proceeds, taking a bond of indemnity:

*Held*, That the proceeds which came into T.'s hands were unincumbered by any appropriation or assignment which could bind him or them, and the surplus above his advances became subject to the attachment, and must be paid to the libellants, with costs.

The libel in this case was filed by the libellants, as sole owners of the bark *Caroline*, to recover the sum of \$3,368.39, with interest from July 26th, 1864, being the balance due on a charter party, whereby the libellant Grant, as master and part owner of the bark and agent for the libellants, chartered her to the respondents for a voyage from New York to New Orleans. On the filing of the libel, process *in personam* was issued, with a clause of foreign attachment commanding the marshal to attach

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McLoon v. Linquist.

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the credits and the effects of the respondents, to the amount sued for, in the hands of Thomas Thacher, of the city of New York. To this process the marshal returned that the respondents were not found, and that he had attached funds in the hands of Thacher. On the return of such process, no person appearing, the default of the garnishee was entered, and it was referred to a commissioner to compute the amount due to the libellants. The report of the commissioner found the amount due to be \$3,368.39, with interest from July 15th, 1864. Subsequently the garnishee, Thacher, appeared and answered the libel. His answer set up, that he held in his hands \$88.67 belonging to the respondents, and that he did not hold any larger sum when the process was served or afterwards, and that he was ready to pay that sum. In answer to the written interrogatories propounded to him, Thacher testified, that, on the 1st of June, 1864, he received from the respondents a cargo of merchandise, and made advances to them thereon, and paid out charges thereon for them, under an agreement with them, that he should consign said cargo to New Orleans and dispose of it and reimburse himself out of the proceeds for such advances and charges, and pay over the balance, if any, to the respondents; that he consigned the cargo to New Orleans and it was sold, and he received the proceeds; and that, after deducting the amount of his advances and cash paid out for the respondents, and the amount of a draft for about \$1,200 drawn on those moneys and payable out of them to the order of Husted & Brownson, he had in his possession \$88.67 belonging to the respondents.

The controversy in the case was about a sum of \$1,259.49, which Thacher paid, in June, 1865, at New York, out of the proceeds of the consignment. The charter party was made May 20th, 1864. Thacher, at the request of the respondents, who composed the firm of Linquist, Norton & Co., advanced to them, in June,

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1864, \$5,561.43, on shipments of goods by them to New Orleans by the bark. The advances were made on the bills of lading and invoices of the goods, which were sent by Thacher, at the request of the respondents, to F. D. Darling of New Orleans, under an arrangement that Darling should sell the goods and remit the whole proceeds to Thacher at New York, and that, out of them, Thacher should reimburse himself and hold the surplus for the respondents. In May, 1864, Husted & Brownson sold to the respondents a quantity of barley malt, some \$2,000 worth, on which they paid about \$800. This malt was part of the cargo of the bark so consigned to Darling. Being pressed for payment, the respondents told Husted & Brownson they could not pay till they got a return from the consignment, but they would give as security a draft on Darling. Accordingly they gave to Husted & Brownson a draft on Darling, drawn by Linquist, Norton & Co., dated June 14th, 1864, for \$1,182.90, payable at sight, to the order of Husted & Brownson, payable "out of proceeds of consignment per bark Caroline, with current rate of exchange on New York." This draft was sent by Husted & Brownson to New Orleans for collection, and was not paid, but was returned with the message that it could not be paid because the balance due on the consignment was not ascertained. Thacher was advised by Darling, in July, 1864, of the existence and presentation of this draft, and was told at the time by Darling, that he had not paid the draft because he was not authorized by Thacher to do so. The attachment in this suit was served on Thacher, September 6th, 1864. Thacher did not receive from Darling funds enough to reimburse his advances till after the service of the attachment. The draft was not accepted or paid by Darling, nor did Thacher put his name on it. Thacher paid the \$1,259.49, in June, 1865, as a payment of the draft, taking a bond of indemnity.

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For libellants, *Joseph H. Choate.*

For Thacher, *Geo. R. Thompson.*

BLATCHFORD, J. It is claimed, on the part of Thacher, that the giving of the draft by the respondents to Husted & Brownson, coupled with the presentation of the draft to Darling and the knowledge of its existence communicated to Thacher by Darling, operated as an equitable assignment to the holder of the draft of an amount of the proceeds of the consignment equal to the amount specified in the draft, and cuts off the claim of the libellants, under their attachment, against such amount.

But there are two objections to this view: (1.) There were no such relations between the respondents and Darling as authorized the respondents to draw the draft on Darling. Darling was the agent and the consignee of Thacher and not of the respondents. He was responsible to Thacher and not to the respondents. The respondents could look to Thacher alone for the proceeds of the consignment. A request by the respondents to Darling to appropriate a part of the proceeds in a particular way imposed no liability on Darling to do so. The drawing of the draft on Darling and its presentation to him were ineffectual to bind him to respond to the holder of the draft. This being so, the fact that he advised Thacher of the existence of the draft cannot be regarded as binding Thacher to respond to the holder of the draft. There was no draft drawn on Thacher to support any notice to Thacher, and all the notice that Thacher had was in respect to a draft which was drawn on a party who was not liable to respond to the drawers of the draft.

(2.) There was no assent by Darling, much less by Thacher, to the assignment of so much of the proceeds as the draft purported to cover. Whatever may be the

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law in some of the States, it is the law of the courts of the United States, that, where an order is drawn, either on a general or a particular fund, for a part only, it does not amount to an assignment of that part, or give a lien as against the drawee, unless he consents to the appropriation by an acceptance of the draft, or an obligation to accept may be fairly implied (*Mandeville v. Welch*, 5 *Wheaton*, 277, 286). The reason assigned for this principle is, that a creditor shall not be permitted to split up a single cause of action into many actions, without the assent of his debtor, since it may subject him to many embarrassments and responsibilities not contemplated in his original contract; that he has a right to stand upon the singleness of his original contract, and to decline any legal or equitable assignments by which it may be broken into fragments; and that, when he undertakes to pay an integral sum to his creditor, it is no part of his contract that he shall be obliged to pay in fractions to any other persons (3 *Leading Cases in Equity, Hare and Wallace's Notes*, 355, 356; 1 *Parsons on Notes and Bills*, 331, 334).

In this case, there was no assent by Darling, so that, even if the consignment had been made by the respondents to Darling, so as to authorize the drawing of the draft on Darling, the presentation of it to Darling would have created no liability on his part to respond to its holder. Nor did Thacher in any way make himself liable to Husted & Brownson, or to the holder of the draft, or to any other person, by any assent or promise, so that he could be held to account to any other person than the respondents for the amount of money covered by the draft. That amount came into his hands, on being sent to him by Darling, unincumbered by any appropriation or assignment which could bind it, or could bind him in respect to it, and the moment it came into his hands it became subject to the attachment in this suit, his advances being reimbursed otherwise. The attachment

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was served on him before he received the amount which he afterwards paid on the draft.

It follows, that the libellants have a right to have the \$1,259.49 as well as the \$88.67 applied towards the payment of the amount due to them by the respondents, and a decree will be entered to that effect, and confirming the report of the commissioner finding the amount due to the libellants. Thacher must also pay so much of the costs of this suit as have been caused by his defence thereto.\*

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NOVEMBER, 1867.

## ONE HUNDRED BARRELS OF WHISKEY, &c.

### WHO IS AN INFORMER?

Where C., being advised that whiskey was being taken from a distillery without payment of tax, went to the District Attorney of the United States, and stated the facts in general, without naming any place, and afterwards procured and gave to the District Attorney an affidavit, made by T., setting forth certain specific violations of law, and T. afterwards made an affidavit contradicting his first one, and alleging that he was drunk when he made it, and made it from purposes of revenge, and the property was afterwards seized, and a libel filed to condemn it, and R., a special revenue agent, being directed to examine into the case, found conclusive evidence of entirely different frauds, whereupon the property was condemned:

*Held*, that, under § 179 of the Internal Revenue Act of June 30th, 1864, as amended by the Act of July 18th, 1866, § 179, C. was not entitled to the informer's share, and R. was entitled to it;

That, as between C. and T., the latter would be entitled to the informer's share. It is not the one who gives information which leads to the seizure of property, but the person who gives information of the cause which leads to its condemnation, who is entitled to the informer's share.

This was a libel of information, filed November 26th,

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\* This decision was affirmed by the Circuit Court, on appeal.



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1866, on behalf of the United States, against "100 barrels of whiskey, and all the tools, implements, instruments and personal property whatever, found in the distillery, 48 Broadway." It averred, that the property proceeded against had been seized on the 23d of November, 1866, as forfeited. On the 7th of January, 1867, on the consent of the claimant of the property, a decree was entered, the purport of which was to condemn all of the property except the whiskey, and release it to the claimant, in consideration of the payment by him, into the registry of the court, of \$2,000, which had been fixed by appraisement as its value, and to condemn the whiskey and release it to the claimant, if he should pay the Internal Revenue tax upon it in thirty days. The \$2,000 was paid into court. On the 2d of July, 1867, an order was made by the court, referring it to John A. Osborn, a commissioner of this court, to ascertain and report to the court the facts and his opinion thereon as to who was the informer entitled to the moiety of the moneys paid into court. The commissioner reported that A. B. Clarke was entitled to be adjudged the informer, and to receive the share of the proceeds provided by law for the informer. There were three persons, each of whom claimed to be entitled to the whole of the informer's share in the case, A. B. Clarke, Henry J. Trumble, and William Richards. Richards excepted to the commissioner's report, on the ground that the commissioner erred in reporting in favor of Clarke as the informer, and ought to have reported in favor of Richards. Clarke and Richards were examined, each on his own behalf. It appeared that Clarke, being advised that whiskey was taken from the distillery, No. 48 Broadway, without the payment of the tax upon it, went to the District Attorney, and stated the facts in general, without naming any place. The District Attorney directed him to procure affidavits. He drew an affidavit, which was sworn to by Trumble on the 9th of November,

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1866, and formed part of the testimony. In that affidavit, Trumble, who had been an employee of the distillery, but had been discharged, stated, as the frauds which had been committed, that false dates in inspection brands had been put upon barrels of rum sent away from the distillery, that 200 barrels of the rum were then in a store in Morris street, naming it, and 150 barrels of the rum were then in a store in Water street, naming it, and large quantities were at other places, naming them, away from the distillery, and that 75 barrels of the rum had been sent to Boston, without any tax having been paid on them, and without having any inspector's brand on them. This affidavit Clarke gave to the District Attorney. On the 15th of November, 1866, Trumble made another affidavit, utterly contradicting his first one, and stating that he had been discharged from employment in the distillery for drunkenness, and, while still drunk, encountered Clarke, and, for revenge, told Clarke what was contained in the first affidavit, and was drunk when he swore to it, and that he knew of no reason why a complaint should be made against the distillery, and knew of no violations of law there. This second affidavit of Trumble was supported by the affidavits of three other persons, one of whom was the father, and one the brother, of Trumble. The purport of them was, that Trumble was a habitual drunkard, and not to be believed on oath, and had been discharged from employment at the distillery for drunkenness, and had offered to withdraw for money the charge contained in his first affidavit. After all these affidavits were presented to the authorities, the seizure referred to in the libel of information was made, on the 23d of November, 1866, and the libel was filed. In December, 1866, Richards, who was a revenue agent, residing at Washington city, was directed by the Commissioner of Internal Revenue to advise with the District Attorney in regard to the case, as it then stood. The affidavits above referred to

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were exhibited to Richards, and also two other affidavits, which were in evidence, in contradiction of a statement in Trumble's first affidavit, and also the report of a revenue inspector, made after the seizure, which was not in evidence. Richards then went to the distillery and questioned the proprietor and other persons there, and examined the premises, and discovered that the spirits were conducted from the worm of the still to a large spirit tank not in the cistern room, in violation of law, and that the proprietor had not complied with the law in regard to keeping his books and making reports. These facts Richards reported to the District Attorney, and he and Richards came to the conclusion that on those facts the property could be condemned. The District Attorney, after the affidavits in contradiction of Trumble's first affidavit had been presented to him, had, in a letter to the Commissioner of Internal Revenue, stated that, in view of such contradiction, he regarded the case as a doubtful one. In consequence of this Richards was directed to make the investigation. After all this had taken place the claimant consented to the condemnation of the property represented by the \$2,000.

The provision of the 179th section of the Internal Revenue Act of June 30th, 1864, as amended by the Act of July 13th, 1866, was, that when any sum was received for a fine, penalty or forfeiture, under a judgment or decree in a suit, such share of it "as the Secretary of the Treasury shall by general regulations provide, not exceeding one moiety nor more than five thousand dollars in any one case, shall be to the use of the person, to be ascertained by the court which shall have imposed or decreed any such fine, penalty or forfeiture, who shall first inform of the cause, matter or thing whereby such fine, penalty or forfeiture shall have been incurred."

The commissioner reported, that the first information which led to the seizure of the property was furnished to the Government officials by Clarke; that no other

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information, on which the property was seized, was lodged, except that furnished by Clarke; that the property was seized on that information, and had been held ever since it was so seized; that the libel was filed on that information and seizure; that Richards had no connection with the case till after the seizure was made and after the libel was filed; that the information or facts which Richards furnished to the District Attorney could be considered only in the light of evidence to justify a condemnation of the property seized, and could not reach back to the time of seizure and deprive the person who first called the attention of the Government to the place, and furnished such information as led to the seizure, of the right which vested in him as informer; that the question being, whether the information which led to the seizure and the libelling, or the evidence subsequently obtained, which was necessary to condemn the same, was to control in determining who was entitled as informer, he was of the opinion that the person who gave the information on which the seizure was based was the informer; and that, as the property in question was seized on Clarke's information, and never abandoned, Clarke was entitled to be adjudged the informer.

For Richards, *S. G. Courtney, U. S. District Attorney.*

For Clarke, *E. F. Brown.*

BLATCHFORD, J. The report of the commissioner proceeds upon an erroneous view of the statute. The informer's share is not given to the person who first gives information on which property is seized, but to the person who first informs of the cause, matter or thing whereby the forfeiture was incurred. In most cases, the distinction is unimportant and does not arise. The property is generally seized, libelled and condemned for the cause of forfeiture pointed out by the information

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furnished by the informer before the seizure. But this case illustrates the distinction between information given on which property is seized, and information given as to the matter whereby the forfeiture was incurred. And the distinction is a very proper and sound one. In this case, information as to specific frauds was furnished with considerable detail in the first affidavit of Trumble. On that information the property was seized and the libel was filed. But the only conclusion that can be arrived at from the evidence is, that if Richards had not investigated the case and examined the premises, the Government would never have obtained a condemnation of the property. The information furnished by Trumble was utterly worthless to the Government, as information of any cause whereby a forfeiture of the property had been incurred. The property, it is true, was seized and libelled on that information, on the assumption that it was true, but, as it must be held, on the evidence, to have been false, the seizure and libelling stand as having been made on no information whatever from Clarke. The Government received, from what was communicated to it by Clarke, no information which was of the least benefit to it, as to the existence of any cause for which it could enforce, by condemnation of the property, any forfeiture that had been incurred. The statute intends that the reward shall be given to the person who gives information of the cause for which the Government can condemn the property. The condemnation is what the Government aims at. It is not its policy to seize property and file a libel on false information given by one person, and afterwards condemn it wholly on true information given by another person, and then bestow the informer's reward wholly upon the former. That is this case, if, on the evidence, Clarke is to be adjudged the informer. Such is not the law. No forfeiture of anything was incurred on account of any cause, matter or thing contained in Trumble's first affidavit, and for the very good

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reason that no cause, matter or thing contained therein had any existence in fact. The error of the commissioner consists in holding that, as Clarke furnished information on which the property was seized and libelled, a right vested in him as informer; and that, as Richards only furnished evidence which justified a condemnation of the property, he is not entitled to be adjudged the informer. It is because Richards, in this case, furnished the information which justified the condemnation that, he was the informer; and it is because Clarke furnished no information which justified a condemnation that he was not the informer. If Clarke had furnished information of any fact which was true as a cause of condemnation for a forfeiture incurred, the case might have been different.

The exception taken by Richards to the report of the commissioner must, therefore, be allowed. If, however, any party interested shall desire to put in further testimony on the subject, or to further examine or cross-examine any of the witnesses already examined, an order may be entered referring the matter back to the commissioner for that purpose.

I have considered the question wholly as one between Clarke and Richards, inasmuch as Richards alone excepts to the report; but, in view of the fact that there may be further testimony and another report, it is proper to say, that, irrespective of the claim of Richards, and as between Clarke and Trumble, on the version of the affair given by Clarke himself, it is difficult to see why Trumble would not be entitled to be adjudged the informer. When Clarke first called on the District Attorney, he named no place, and, therefore, gave no information, in the sense of the statute. When he came the second time, all that he testifies to having done was to hand the District Attorney Trumble's affidavit. On this state of facts, if the affidavit contained a true statement of any cause for which a forfeiture of

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the property had been incurred, Trumble was the first person who informed the Government authorities of such cause.

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NOVEMBER, 1867**RICHARD SQUIRE v. ONE HUNDRED TONS OF IRON, &c., AND WALTER RAHMING, ET AL.****SALVAGE.—AGREEMENT.—JURISDICTION.**

Where the libellant, who owned some blocks, let them to parties who were endeavoring to get off a wrecked vessel which they had bought, at Nassau, N. P., to be used in getting the vessel off, at so much a day, the vessel to be responsible for the hire and for the safe return of the blocks:

*Held*, that he had no claim to recover, as a salvor, the price agreed upon, or for the loss of the blocks, either *in personam* against the parties who owned the wreck, or against property saved from her;

That the clause making the vessel responsible for the blocks and for their hire, did not create any hypothecation of her which a court of admiralty can enforce.

BLATCHFORD, J. This is a libel for a salvage compensation, filed against one hundred tons of iron, alleged to have been saved from a steamer called the Agnes Louisa, at Nassau, N. P., and against Henry N. Farr, John C. Rahming, Walter Rahming, Henry Rahming, and Oliver M. Pettit. The return of the marshal to the process issued on the libel, was, that he had attached the property proceeded against, and had served the process personally on Walter Rahming and on Pettit. The substance of the libel is, that the vessel was stranded and wrecked near Nassau; that the libellant, in April, 1865, was the owner of certain blocks, of the value of \$965, which the respondents, at that time, procured from him at Nassau, for the purpose of saving the wreck, promising him that they should be used in such service, and

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that he should receive \$5 per day per pair, and \$1,300 out of the materials which should be saved out of the wreck, and should obtain his compensation out of the wrecked property when saved; that the respondents saved various materials from the wreck, and one hundred tons of the same, called old iron, had been brought to New York; that the respondents totally lost the libellant's blocks in and about the wreck and while saving the materials thereof; that the per diem compensation due to the libellant for the use of the blocks amounts to \$2,457, besides the \$1,300 to be paid out of the savings of the wreck, making his total claim, with the value of the blocks, \$4,722; and that he claims a hypothecation of the one hundred tons of iron to pay his demands, and has, by way of maritime lien thereon, a right to attach it and have it sold to pay his demands.

The only answer put in in the case is that of John C. Rahming, as claimant of "about thirty-three tons of old iron," attached in the cause, who answers on behalf of himself and Walter Rahming, Henry Rahming, and Pettit. This answer denies all the allegations of the libel, except that the claimant purchased the steamer, and has saved some things out of her and brought them to this district, and avers that no person who was owner of the steamer hired any blocks from the libellant, and that some blocks of the libellant's, of small value, were used, and their use was of little or no value.

The libellant has been examined as a witness on his own behalf, and testifies that the steamer was ashore and a wreck in the ocean, outside of the harbor of Nassau, and that, in April, 1865, after the respondents John C. Rahming and others had purchased the vessel at an admiralty sale, the respondent Farr, who was her master, hired seven blocks from him, under a written agreement, of which the following is a copy: "Nassau, April 15th, 1865. This is to certify that I, as master and head wrecker of the steamship Agnes Louisa, have agreed



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with Captain R. Squire, for the hire of seven large blocks, at the rate of \$5 per day per pair, for the use of said blocks, to be used in endeavoring to get the above steamer off of the beach at Hog Island, said ship to be responsible for hire and damage, also for safe return of said blocks to him in good order. Capt. H. N. Farr, for ship and owners." Squire testifies that these blocks were taken by Capt. Farr under this agreement, and were used on the vessel in endeavoring to get her off, from the date of this agreement, until he, Squire, left Nassau, December 18th, 1865; that the blocks have never been returned to him; and that, the day before he left Nassau, he demanded the blocks from the Rahmings, and they begged him to leave them, and said they would send them to him at New York. Another witness testifies that, on that occasion, the Rahmings told Squire they would pay him for the blocks if he would leave them.

This is the substance of the case for the libellant. Although he swears, in his libel, that the agreement was that he should receive, for the use of his blocks, \$5 per day per pair, and \$1,300 out of the materials saved from the wreck, yet, in his testimony, he does not pretend that any such agreement in reference to \$1,300 was made, and the agreement he proves is a written one, specifying no other compensation than \$5 per day per pair. So, too, in his libel, he swears, that the agreement was that he should obtain his compensation out of the wrecked property when saved. The agreement he proves is an absolute one to pay him \$5 per day per pair at all events, and he testifies that he never proposed to Henry Rahming that the compensation for the blocks should depend on the success in getting off the wreck, and never altered his original agreement, and never told any one that the compensation was to depend on such success.

It is perfectly clear that the libellant has no claim as a salvor. He merely hired his blocks for a fixed compensation to parties who were endeavoring to get off the

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vessel. He was to be paid at all events, whether the vessel was saved or not. Besides, if he could claim as salvor against the iron attached, there is no proof in the case that such iron was a part of the vessel in question. He has, however, no claim which he can recover in this suit, either *in rem* or *in personam*, for the hire of his blocks or for their value, on the principle of recovering for a salvage service (*The Independence*, 2 *Curtis' C. C. R.* 350).

In regard to the claim of the libellant to recover, either *in rem* or *in personam*, upon some other ground than for a salvage service, I am unable to perceive any principle upon which he can so recover in the admiralty. The contract was not one for repairs, supplies, or other necessities furnished to the vessel, in the sense in which, either by the general maritime law, or by the 12th Rule of the Rules in Admiralty prescribed by the Supreme Court, the furnishing of such articles gives a right of action in the admiralty. And, granting that Capt. Farr had authority to make the agreement he did, I do not think that the clause in the agreement which makes the vessel responsible for the hire of the blocks and for damage to them and for their safe return, creates any hypothecation of the vessel, which a court of admiralty can enforce.

The libel must, therefore, be dismissed, with costs. It may be that the libellant has a valid claim against some person or persons for the use and value of his blocks, but, if so, he has clearly mistaken the forum in which he can obtain relief.

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NOVEMBER, 1867.

## THE E. C. SCRANTON AND THE EMERALD ISLE.

## COLLISION AT A PIER.—PRACTICE.—HARBOR MASTER.

In a cause of collision against two vessels, if one of them is found to have been solely in fault, a decree may be rendered against her alone, although the libel charges the collision to have been caused by the joint negligence of both.

Where a vessel, lying at a pier, was injured by another vessel, in an effort made by the latter to get into a berth at the next pier, by carelessness on the part of the latter :

*Held*, That the latter vessel was liable for the damage.

Where a harbor master had, by forgetfulness, assigned two vessels to the same berth, and both came to the place about the same time, and one, in trying to get in, was swept down by the tide, away from the berth, against a vessel lying at the next pier, and the other, coming in properly and finding the berth vacant, went into it, it being charged that, in so doing, she broke a line which the first vessel had got out, and thus caused her to drift down upon the vessel lying at the next pier :

*Held*, That the second vessel was not in fault in taking the berth, and, on the facts, was not guilty of negligence in going in.

BLATCHFORD, J. This is a libel *in rem*, filed by John Collins, Jr., as charterer and *pro tanto* owner of the steamboat John Hart, against the ship E. C. Scranton and the ship Emerald Isle, to recover damages for a collision which occurred on the 15th of September, 1855. The John Hart was lying on that day, about half-past two o'clock in the afternoon, at her proper berth on the east side of pier No. 35, East River, New York, preparatory to leaving, at a quarter past three o'clock the same afternoon, for Norwalk, in Connecticut, between which place and New York she regularly plied. While she was in this position, the ship E. C. Scranton was seen coming up along the piers from the westward, in tow of a steam-tug, the tug being lashed

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The E. C. Scranton and The Emerald Isle.

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to the starboard side of the E. C. Scranton. The tide was running strongly ebb, it having been high water that day at eleven o'clock, A. M., at the Battery. The tide was thus against the E. C. Scranton. The John Hart, as she lay, headed to the south, her stem being about even with the south end of the pier, and the E. C. Scranton and her tug headed to the eastward. When the E. C. Scranton and her tug came to a point about opposite to the slip, between the east side of pier No. 35 and the west side of pier No. 36 (pier No. 36 being the next pier to the westward of pier No. 35), the libellant, who was the master of the John Hart, saw that the E. C. Scranton was making for a berth which was vacant along the west side of pier No. 36, there being no vessel then either at the west side of pier No. 36, or at the outer end, which was the south end of that pier. The way was thus clear for the E. C. Scranton to take a berth at the west side of pier No. 36. But the master of the John Hart saw that, with the tide running as strongly ebb as it was running at that place, the E. C. Scranton, with a tug on her starboard side, would, in attempting to come into the slip head on (which was her movement), and put her starboard side lengthwise against the west side of pier No. 36 (which was what she must do to reach the berth she was aiming for), probably drift down against, and come into collision with, the John Hart. The master of the John Hart, therefore, hailed the pilot of the E. C. Scranton, and warned him that there was danger of his striking the John Hart. The pilot paid no attention to the warning, but persisted in bringing his vessel into the slip in the manner referred to. The result was, that the E. C. Scranton came into collision with the John Hart and damaged her seriously. The tug, being on the starboard side of the E. C. Scranton, was obliged to cast loose, in order to enable the ship to come up to pier No. 36, and to prevent being herself jammed between the ship and the pier. The result was, that the E. C. Scranton, being deprived

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The E. C. Scranton and The Emerald Isle.

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of all adequate motive power that could control her movements, drifted into a position angling across the slip with her stem to the northeast, and near to pier No. 36, her port bow resting against a sunken crib at the northeast corner of the slip, and her stern, on the port side, crushing against the John Hart. For the damage caused to the John Hart by this collision, the E. C. Scranton is clearly responsible. She was navigated with great carelessness. With the tide such as it was, it was very reckless in her to attempt to go into the slip head on with the tug on her starboard side. If the tug had been on her port side, probably the collision would not have occurred, for then the tug would not have been obliged to cast loose from her before she was safely moored to pier No. 36, and would have been able to keep her up to that pier and away from the John Hart. Testimony was put in to show that it was safe to berth vessels at the west side of pier No. 36, at such a stage of an ebb tide as that which prevailed at the time of this transaction, but this testimony only goes to show the carelessness in navigating the E. C. Scranton. If it was not safe to berth a vessel there at that time, then it was negligence to attempt to do so. If it was safe to do so, provided the vessel was properly navigated and managed, the fact that it was not safely done in this case, shows that the vessel was not properly navigated or managed. There was nothing wrong in the attempt of the E. C. Scranton to take the berth in question, provided she did so in a proper way and at a proper time, for she was authorized to do so by the harbor master of the port, who was the proper authority in the premises. She is responsible, however, for her navigation, in attempting to take the berth.

As to the Emerald Isle, it appears that, after this collision between the E. C. Scranton and the John Hart, the Emerald Isle, having been assigned by the same harbor master to the same berth, at the west side of pier No.

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36, to which the E. C. Scranton was assigned, came to take the berth. The error of the harbor master in assigning two vessels to the same berth appears to have been one of forgetfulness, in the hurry and press of business, and neither vessel was guilty of any illegal act, in the mere abstract attempt to take the berth. The Emerald Isle had two steam tugs lashed to her sides, one on her starboard side and one on her port side. She approached from the southward from across the East River, heading directly to the northward, in a line parallel with the west side of pier No. 36, and sufficiently to the westward of it to enable her to make the berth properly. Her navigation appears to have been in all respects proper. As she approached, the berth was clear of obstruction. The E. C. Scranton was lying in the angling position before described, with her starboard bow ten or twelve feet away from pier No. 36, and her stern, on her port side, against the John Hart. A line was got out from the Emerald Isle and made fast to pier No. 36, and then her starboard tug was cast off, leaving her port tug still fast to her, and in a position, her starboard tug being out of the way, to crowd her up to pier No. 36, which was done, her port tug not being cast loose till the ship was moored close to the pier. I am entirely satisfied that the Emerald Isle never came in contact with the John Hart at all. The master of the John Hart is mistaken in his testimony on that subject. The occurrence took place twelve years ago, and it is very much to be regretted that so long a time has been allowed to elapse before the trial of the cause, for it appears that many disinterested witnesses are either dead or beyond reach. There is one fact, however, which is conclusive to my mind, to show that the stern of the Emerald Isle could not have come into collision with the John Hart in the manner testified to by the libellant. It is in proof that the stern of the port tug of the Emerald Isle projected aft beyond the stern of the Emerald Isle. This being so, it would have been that

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port tug that would have come against the John Hart, and that tug would have been crushed between the John Hart and the ship. But there is not a particle of evidence that the John Hart was touched by that tug, or that that tug was injured. It may very well be that the flag staff of the John Hart, as she went out of the slip after the collision, came into contact with some projecting part of the Emerald Isle and was broken, but, if so, that was not because of any fault on the part of the Emerald Isle.

It is sought to make the Emerald Isle responsible for a part or the whole of the damage to the John Hart, on the ground that, in coming in to her berth she willfully ran against and parted a taut line which it is claimed the E. C. Scranton had at the time got out from her quarter to pier No. 36, and that the effect of the parting of this line was to throw the E. C. Scranton anew against the John Hart, she having at the time, as is alleged, been warped by means of the line to a point some distance to the eastward of the John Hart. But I do not think it is made out that the Emerald Isle parted any such line, nor, if she did break or overrun any line which ran from the E. C. Scranton to pier No. 36, is it satisfactorily shown that her doing so caused the E. C. Scranton to inflict on the John Hart any more injury than she would otherwise have inflicted. And, although, as the Emerald Isle came up alongside of pier No. 36, her port bow came in contact with the starboard bow of the E. C. Scranton, yet, from the position in which the E. C. Scranton lay with her port bow crowded against the corner of the sunken crib, and the place where the Emerald Isle came in contact with her, the Emerald Isle could not, by thus coming in contact with her, have caused her to inflict any additional injury on the John Hart.

The effort on the trial, on the part of each of the two vessels sued, was to free herself from blame and to throw the blame on the other, and each also contended, that,

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even if she herself was wholly to blame, yet no recovery could be had in this suit unless a joint fault was proved in respect to the two vessels, and then only as to injuries which resulted to the John Hart from matters in respect to which the two vessels were jointly in fault. In other words, the E. C. Scranton contends, that if it appears that she was wholly to blame, no recovery can be had against her in this suit, for the reason that the libel sues the vessels jointly, and is not sustained unless it is shown that the vessels were jointly concerned in every act in respect to which the court awards a recovery. In this case I hold the E. C. Scranton to have been in fault, and the Emerald Isle to have been free from fault; and the case of *Sturgis v. Boyer* (24 *How.*, 110), is an authority for allowing a recovery against the E. C. Scranton and dismissing the libel as against the Emerald Isle.

The libel must be dismissed as against the Emerald Isle, with costs; and there must be a reference to a commissioner, as respects the E. C. Scranton, to ascertain and report the damages caused by the collision, and for such damages, with the costs of the suit, there must be a decree against the E. C. Scranton.

*Beebe, Dean & Donohue*, for libellant.

*Isaiah T. Williams*, for the E. C. Scranton.

*Daniel D. Lord*, for the Emerald Isle.



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The Brig Eledona.

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DECEMBER, 1867.

## THE BRIG ELEDONA.

## MATERIAL MAN.—LIEN.—NECESSITY FOR CREDIT.

Where the libellant furnished a mast for a foreign vessel in the port of New York, supposing that the master of the vessel was ordering it for the vessel, and rendered a bill against the vessel and owners on the same day that he furnished it, but had made no inquiry, and received no information, as to whether the vessel needed the mast, or as to whether the master had means or credit, or as to whether it was necessary for him to obtain it on the credit of the vessel; and where it appeared that the master had at the time means to pay for the mast, and had contracted with parties other than the libellant to furnish the mast, and actually paid them for it on the day it was put into the vessel:

*Held*, That there was neither a real, nor an apparent, necessity for pledging the credit of the vessel, and that the libellant, therefore, had no lien on the vessel; That the twelfth Admiralty Rule of the Supreme Court was only intended to regulate the practice of joining ship, freight, owner, and master in one suit; and that the question of the right to sue ship, or freight, or master, or owner, for supplies or repairs, does not depend on the twelfth Rule, but on the general Admiralty and Maritime Law.

The cases of *Thomas v. Osborn* (19 How. 22), and *Pratt v. Reed* (*Id.* 359), discussed.

This was a libel by David J. Taff, against the brig Eledona, a British vessel, belonging to the port of Halifax, in Nova Scotia, to recover the sum of one hundred and fifty dollars, as the value of a main-mast, which he alleged he furnished to the vessel, at New York, on the 30th of August, 1867. The libel alleged that the vessel was in need of the mast, and that the libellant furnished it, at the request of the master or agent of the vessel, and on the credit of the vessel. It did not allege that the master or owners were without credit or means, or that the mast could be obtained only on the credit of the vessel, or that such credit was necessary; and the answer excepted to the libel for the want of these aver-

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*The Brig Eledona.*

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ments. The answer set up, as a defence, that, the vessel being at New York, and the master and owners having abundant credit and means, certain persons, of whom the libellant was not one, contracted to do certain repairs on the vessel, including the furnishing of the mast in question, and that those persons furnished the mast, and that, if the libellant ever owned the mast, it was sold to those parties.

It appeared by the evidence, that, on the 22d of August, 1867, the master of the Eledona entered into a written contract, at New York, where the vessel then was, with the firm of Clickener & Fowler, shipwrights, caulkers, and spar-makers, to make sundry repairs to the vessel, including the furnishing of a new main-mast, and the taking out of the old main-mast, and the putting in of the new one, for the sum of two hundred and twenty-five dollars. The master testified that the vessel needed the mast; that he paid Clickener & Fowler for the mast on the 30th of August, 1867, the day it was put into the vessel; that such payment was made with his own money; and that he required no credit for the mast, having the money to pay for it. The mast was procured from the libellant, but it did not appear that the libellant knew anything about the contract between the master and Clickener & Fowler, or knew that Clickener & Fowler had anything to do with furnishing or putting in the mast. The libellant supposed that he was furnishing the mast on the order of the master of the vessel, and he made out a bill for it against the vessel and her owners, on the 30th of August, 1867, the same day that the mast was furnished by him, but he suffered the mast to leave his premises and control before presenting the bill at the vessel. The libellant, before furnishing the mast, made no inquiry, and received no information, as to whether the vessel needed the mast, or as to whether the master had means or credit, or as to whether it was necessary for the master to obtain the mast on the credit

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of the vessel, but was satisfied to deliver the mast upon the simple fact that he supposed the master was ordering it for the vessel.

For libellant, *A. F. Smith.*

For claimant, *C. Donohue.*

BLATCHFORD, J. On the facts in this case, the libellant claims a lien on the vessel, for the value of the mast—one hundred and fifty dollars. It is urged, on his part, that, in order to give a lien on a vessel to a material man, for supplies or repairs furnished or made to the vessel, it is only requisite to show that a necessity existed for the supplies or repairs, and that they were furnished or made to the vessel in a foreign port; and it is claimed that the cases of *Thomas v. Osborn* (19 *How.* 22), and *Pratt v. Reed* (*Id.* 359), decided at the December Term, 1856, so far as they established a different rule, were a departure from prior well established principles, and have been since overruled by the reenactment by the Supreme Court, at the December Term, 1858, of so much of the twelfth Rule in Admiralty as relates to suits by material men for supplies or repairs or other necessities for a foreign ship, or for a ship in a foreign port, and by the decision in the case of *The Steamer St. Lawrence*, (1 *Black*, 522). It is also urged, that Mr. Justice Nelson, who delivered the opinion of the court in *Pratt v. Reed*, has since, in cases adjudged by him, given to the decision in that case a construction which will admit of the existence of a lien on the vessel in this case in favor of the libellant, on the facts in proof. The claim on the part of the libellant comes to this, that, inasmuch as the contract in this case under which he furnished the mast was a maritime contract, and the mast was furnished for a foreign vessel, and was in fact necessary for her, he has a right, under the twelfth Rule

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in Admiralty, to proceed against the vessel *in rem*, to recover the value of the mast.

There was nothing new in the decisions in *Thomas v. Osborn* and *Pratt v. Reed*. They merely applied and enforced the well settled principles of admiralty and maritime law, established for the protection of ship-owners whose vessels are found in foreign ports, as well as for the security of parties furnishing necessities to such vessels. In *Thomas v. Osborn*, it was held, that the master of a vessel has power, in a foreign port, to hypothecate the vessel for necessary supplies and repairs furnished and made to her, either by an express hypothecation of her, as by a bottomry bond, or by an implied hypothecation of her, by obtaining such supplies and repairs on her credit, in a case of necessity; but that his authority so to hypothecate her is limited to cases where there is a necessity for obtaining the supplies or repairs on her credit, as well as a necessity for having them at all; that the person furnishing the supplies or repairs must see to it that apparently such necessities, both of them, exist, before he can claim that the vessel is hypothecated to him; and that this limitation on the authority of the master, and this duty imposed on the furnisher, are as ancient and well established as such authority itself. It was also held, in that case, that, to constitute a case of apparent necessity, not only must the supplies and repairs be needful, but it must be apparently necessary for the master to have a credit to procure them; that if the master has funds which he ought to apply to pay for the supplies and repairs, then no case of actual necessity for a credit exists; and that, if the furnisher knows these facts, or has the means, by the use of due diligence, to ascertain them, then no case of apparent necessity exists to have a credit, and the act of the master in procuring a credit does not bind the vessel. The case of *Pratt v. Reed* only enforced the decision in *Thomas v. Osborn*, by holding again, that to create an implied

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hypothecation of a vessel for supplies furnished to her in a foreign port, not only must a real or apparent necessity exist, at the time, for the supplies, but a real or apparent necessity must also exist, at the time, for giving a credit upon the vessel in order to procure them.

So much of the twelfth Rule in Admiralty as is invoked in behalf of the libellant was in force in the same language, when these decisions were made, that is found in the twelfth Rule, as amended at the December Term, 1858. That Rule, in saying that, "in all suits by material men for supplies or repairs, or other necessities, for a foreign ship, or for a ship in a foreign port, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*," only means, that, where a material man has a right to sue for supplies, repairs, or necessities for such a ship, he may, if he has a right to sue the ship *in rem*, and the freight *in rem*, join them in one suit *in rem*, but that he cannot join the master and the owner, or either of them, as a respondent, *in personam*, in the same suit with such proceedings *in rem*; and that, if he has a right to sue the master *in personam*, and the owner *in personam*, he cannot sue them both in one suit *in personam*, but may sue either of them *in personam*. But the question of the right to sue ship, or freight, or master, or owner, in a Court of Admiralty, for the particular supplies, repairs, or necessities, does not depend at all on the twelfth Rule, but depends on the general admiralty and maritime law.

Nor has the ancient rule been at all relaxed since the decisions in *Thomas v. Osborn* and *Pratt v. Reed*. The case of *The Steamer St. Lawrence* (1 *Black*, 522) contains nothing to affect those decisions; and, in the Circuit Courts within the Second Circuit, their authority has been upheld and applied, in very recent cases, by Mr. Justice Nelson. In the case of *Tall v. The James*

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Guy, in the Circuit Court for the Eastern District of New York, on appeal (September, 1867), Judge Nelson upholds the soundness of the decision in *Pratt v. Reed*, as above defined, and holds that, in every case, the question of the necessity for the repairs or supplies, as well as the question of the necessity for creating a lien on the vessel for them, must depend on the facts and circumstances of the case. Again, in the case of *Ross v. The Steamboat Neversink*, in the Circuit Court for this district, on appeal (November, 1867), Judge Nelson refers to the cases of *Thomas v. Osborn* and *Pratt v. Reed*, and says, in regard to those cases, that the decisions in them were placed upon ancient and settled authority; that those decisions extend no rule beyond its ancient strictness, and lay down the principles which are to govern cases of the kind; that no fixed rule can be laid down in advance as to what will be sufficient proof of an apparent necessity for giving credit to a vessel, but the question must rest in the sound judgment of the tribunal before which the proof is presented; that good faith and fair dealing must be exacted, in every case, on the part of the person furnishing the supplies or repairs; and that the absent owner ought to be guarded against any collusion of the master with the material man or the furnisher of supplies, and against an unnecessary tacit incumbrance upon his vessel. In that case, Judge Nelson upheld the lien on the vessel, because the supplies were furnished at a place where the owners of the vessel were not present, and, in the sense of the maritime law, in a foreign jurisdiction, and because the master had no means wherewith to pay for the supplies. He held, therefore, that there was an apparent necessity for a credit to the vessel. In the case of *Bickford v. The Brig Caroline*, in the District Court for the District of Massachusetts (November, 1867), it was held, by Judge Lowell, on the authority of *Pratt v. Reed*, that the material man had no lien on the

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vessel for the supplies, the evidence being, that the supplies were furnished to her at Boston, she being a foreign vessel, on the order of her master, who was also her owner, under circumstances not sufficient to satisfy the court that the supplies could be obtained only upon a pledge of the credit of the vessel.

Now, in the present case, the mast was necessary for the vessel, but there was clearly no real necessity, and not even an apparent necessity, for pledging the credit of the vessel to procure the mast. The master had the money to pay for the mast, and did pay for it. On the evidence, he paid the party who furnished it to him, and, although the libellant has not been paid for the mast, yet his own negligence is the cause. He could have learned, by the exercise of due diligence, that the master had the means of paying for the mast, and that there was no necessity for pledging the credit of the vessel to pay for it. But he made no inquiry on that subject. It may be that the conduct and language of the master were such, on his interview with the libellant, as to make the master personally liable to the libellant for the value of the mast; but neither the owner nor the vessel is liable. This case is one fully illustrating the propriety of adhering strictly to the rule laid down in *Thomas v. Osborn* and in *Pratt v. Reed*. The master had the money to pay for the mast, and did pay for it to the party with whom he contracted for it, and who procured it from the libellant; and, although it may have been furnished by the libellant, under circumstances which led him to suppose that he was furnishing it to the vessel on the direct order of the master to him for it, yet no facts existed which authorized the master to pledge the credit of the vessel to the libellant for the mast. To allow the lien in this case would be to create an unnecessary incumbrance on the vessel, and to open the door for collusion between masters and material

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men—evils which the law, as expounded in the cases referred to, aims to cure.

The libel must be dismissed, with costs.

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DECEMBER, 1867.

## IN THE MATTER OF GEORGE W. KIMBALL, A BANKRUPT.

### ARREST OF BANKRUPT UNDER STATE PROCESS.—PRIVILEGE OF WIT- NESS.—DEBT CONTRACTED BY FRAUD.

Where a suit was commenced against a bankrupt in a State court, the complaint being simply for goods sold and delivered, but, on affidavits showing a fraudulent contracting of the debt, an order of arrest was issued against him, and he was arrested :

*Held*, That the bankrupt was not exempt from such arrest, under the twenty-sixth section of the Bankruptcy Act. The words "the same," in that section, refer to the arrest, and not to the action.

But as the bankrupt, when arrested, was on his way to the register's office, for the purpose of being examined, under an order (Form No. 45) which had been served upon him :

*Held*, That that order was substantially a subpoena, and that the bankrupt was entitled to be considered as a witness ;

That, as such witness, and also as being a party to the bankruptcy proceedings, he was entitled to protection from arrest at the hands of any other tribunal ;

That this court, whose process had been interrupted, had power to give him that protection, and that he must be discharged from this arrest, on the ground that it was a breach of his privilege ; but that, as soon as the privilege should cease, he would be liable to be rearrested.

BLATCHFORD, J. This is an application to discharge from imprisonment the bankrupt in this case, who is confined in close custody, in Ludlow-street Jail, by virtue of an arrest made by the sheriff of the city and county of New York. The bankrupt was declared a bankrupt by this court, on the 16th of November, 1867, on the petition of one of his creditors. By the order of



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adjudication, the case was referred to one of the Registers in Bankruptcy, Mr. Isaiah T. Williams; and Mr. Williams, in pursuance of the authority granted by the Bankruptcy Act, issued an order, under the twenty-sixth section of the Act, according to Form No. 45 of the Forms in Bankruptcy, requiring the bankrupt to attend before him, to submit to an examination, on the 6th of December, 1867. After the bankrupt had been served with this order, and a few moments before the hour appointed for the examination, and while the bankrupt was on his way to the office of the register, and was in the same building in which the office of the register is situated, with the order for such examination upon his person, he was arrested by the sheriff, upon an order of arrest issued as *mesne process* in a civil suit in the Supreme Court of the State of New York; and he applies now to this court to be discharged from his imprisonment, upon the ground that he was arrested while he was on his way, under the process of this court, to be examined thereunder. There is no statute of the United States, as there is of the State of New York, giving protection to a witness from being arrested in a civil suit, while he is in process of obeying a subpoena, issued from a competent court, for his examination as a witness. I have heretofore decided, that a bankrupt, in all matters relating to his examination under the twenty-sixth section of the Bankruptcy Act, is substantially a witness, and that he is to be examined and cross-examined as a witness, and is entitled to be considered as a witness in all respects. The order, or summons, according to Form No. 45, which is issued and served upon him, commanding him to appear and be examined, is substantially a subpoena. The twenty-sixth section of the Act provides, that the court may require him to attend, upon reasonable notice, and submit to an examination on oath, and that, if he neglects to obey any order of the court, he may be committed and punished as for a contempt of court. He must, therefore, when served

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with such order or summons, be regarded as a witness under a subpoena, and as entitled to the same protection to which any other witness, subpoenaed to attend before a court, or an officer of the court, is entitled. He is also a party to the bankrupt proceedings, and is entitled to all the protection which any party to any suit is entitled to under like circumstances. Such protection was decided by the Circuit Court of the United States for the District of Pennsylvania (Hurst's Case, 4 *Dallas*, 387, and 1 *Wash. C. C. R.* 186) to be a protection thrown around him by the court from which the subpoena issues. In that case, the party was in attendance at Philadelphia, having gone there from his residence at New York, for the purpose of being present at the trial, in that court, of a suit to which he was a party, and he was also under process of subpoena from that court to attend it as a witness in another suit, when he was arrested at his lodgings, at a tavern in Philadelphia, by a State sheriff, on a *capias ad satisfaciendum*, issued out of the Supreme Court of Pennsylvania. An application was made to the Circuit Court of the United States to discharge him from imprisonment, and it was granted by Mr. Justice Washington and Judge Peters, holding the court, who decided that the Circuit Court of the United States had competent authority to discharge the party from arrest, because of the breach of his privilege which had been committed, in order that the proceedings of the court might not be impeded; and that the order for such discharge would be a justification and protection to the sheriff in discharging him. In the present case, as the order or summons was issued by this court, the application is made to it to discharge the party from his imprisonment. Although there is no statute of the United States upon the subject, yet the law is well settled, that a party and a witness is, under such circumstances, entitled to be protected by the court whose process has been interrupted. The plaintiff, at whose

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instance he was arrested in the State court, may re-arrest him, under the same or other process, whenever the privilege ceases; but the privilege must be enforced, and the order of the court discharging the party from his imprisonment will be a conclusive justification of the sheriff in every other court, and even in the State court itself, which issued the process. The privilege is one not merely for the benefit of the party and witness, but exists for the purpose of maintaining the dignity, and carrying out the commands, of the court which issues the subpoena, and of promoting public justice, it being necessary that private right should for the time being yield to the public good (*Lyell v. Goodwin*, 4 *McLean*, 32). In the present case, the party was clearly entitled to his privilege, both as party and as a witness, and I shall, therefore, make an order discharging him from the custody of the sheriff, upon the ground that his arrest, under the circumstances under which it was made, was a breach of his privilege.

There is another ground urged in this case for the discharge of the party from imprisonment, but which I do not regard as sufficient ground for his discharge. He claims to be discharged under the last clause of the twenty-sixth section of the Bankruptcy Act, which provides, that "no bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy, in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him." The thirty-third section of the Act provides, "that no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act." The cause of action set out in the complaint in the suit in the State court, in which the party was arrested, is simply a complaint for the recovery of five hundred and sixty dollars for goods sold and delivered to him, and the summons is a sum-

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mons for a money demand on contract for five hundred and sixty dollars. There is no allegation in the complaint that the debt was fraudulently contracted, nor any averment, except that so much money is due for goods sold and delivered; but the affidavits upon which the party was arrested set forth facts which show a fraudulent purchase of the goods, and a fraudulent contracting of the debt, and make out a case where the debt is one created by the fraud of the bankrupt in making fraudulent representations as to his solvency and pecuniary means and ability at the time he purchased the goods. If these averments had been contained in the complaint, there would have been no question in the case, but they are only contained in the affidavits on which the order of arrest was granted; and the ground urged for the discharge of the party is, that, under this last clause of the twenty-sixth section of the Act, it is necessary that the action should be founded upon the debt from which the discharge in bankruptcy would not release the party. It is clear that, upon the face of the papers in this case, this debt was created by the fraud of the bankrupt. Being such a debt, it is one that will not be discharged by his discharge under the Act. But it is contended, on the part of the bankrupt, that the words "the same," in the twenty-sixth section—"unless the same is founded on some debt or claim, from which his discharge or bankruptcy would not release him"—mean the *action*; and, on the part of the plaintiff in the suit in the State court, it is contended that the words "the same" mean the *arrest*. Whether the one or the other of these interpretations of the words "the same," in the section, is given to those words, makes a material difference; because, if the interpretation of the bankrupt is the correct interpretation, that the action must be founded on the debt or claim, then it is clear that the action in the State court is not founded on a debt or claim from which the discharge would not release him.

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It is founded on a naked sale of the goods, with no element of fraud in it. Whereas, if the arrest is what is to be founded on the debt or claim, it is very clear that the arrest in this case was founded upon a debt created by fraud, and one from which the bankrupt would not be released by his discharge in bankruptcy. After a careful consideration of the language of the provision in question, and its meaning and object, in connection with the language of the thirty-third section, I have come to the conclusion that the good sense of the statute is, that whenever the ground of arrest in the State court is a debt created by fraud, the party is not entitled to the privilege of exemption from arrest; and that it would be too narrow and technical an interpretation of the language to hold that the words "the same" refer merely to the action, although that is the last antecedent. The intent of the Act is, I think, that whenever the party is under arrest on account of a debt created by his fraud, neither this court, nor the State court, has any right to interpose and discharge him, because of the pendency of proceedings in bankruptcy. It is contended, on the part of the bankrupt, that the plaintiff in the suit in the State court has, by force of what is, and what is not, contained in his complaint, waived the tort, and confined himself strictly to the contract. But that is not conclusive at all of the question. I think that when the court sees that the party is arrested, as in this case, for a debt from which he would not be discharged by his discharge in bankruptcy, the arrest and imprisonment must hold good.

The bankrupt is, however, entitled to be discharged in this case, because he was unlawfully arrested, in violation of his privilege, and of the authority of this court. The moment that that privilege ceases, he will, of course, be liable to be rearrested. But, on the face of the papers now presented, I hold that the bankrupt is not entitled to exemption from arrest entirely in the

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case, but that the sheriff had no right to arrest him under the circumstances under which he was arrested, and that an order must be entered discharging him from such arrest.

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DECEMBER, 1867

## IN THE MATTER OF HENRY BERNSTEIN, AN INVOLUNTARY BANKRUPT.

### LIEN OF JUDGMENT ENTERED BEFORE THE BANKRUPTCY PROCEEDINGS.

Where, before proceedings were taken in involuntary bankruptcy, a judgment was entered against the bankrupt in a State court, by default, on which an execution was issued and a levy made, and the bankrupt unsuccessfully endeavored to have the judgment, execution, and levy set aside, and the sheriff then advertised the property for sale, but was stopped by an injunction from the Bankruptcy Court, which injunction was, on a representation that the goods were perishable, modified so as to allow the sheriff to sell, directing him to hold the proceeds subject to the order of this court, and the sheriff sold them, and an application was then made to dissolve the injunction, there being no impeachment of the *bona fides* of the judgment, execution, and levy:

*Held*, That the lien of the levy was preserved by the Bankruptcy Act and should be respected by this court;

That the sheriff should be directed to apply the proceeds of the property in his hands to the satisfaction of the execution, paying the overplus to the bankrupt's assignee, or, if there was no assignee, to the clerk of the court.

The firm of Wilmerding, Hoguet & Co. obtained a judgment against the bankrupt, on the 21st of October, 1868, for \$2,930.30, in a suit in the Supreme Court of New York, for a money demand on contract, founded on two promissory notes made by him, and on a sale and delivery of goods to him. The suit was commenced on the 25th of September, 1867, and the judgment was obtained in due course, by default, after personal service of a summons. On the same day on which the judgment was obtained, an execution was issued thereupon to the

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sheriff of the city and county of New York, and he made a levy thereunder on a stock of goods in the store of the bankrupt in the city of New York. The goods were advertised for sale by the sheriff for the 28th of October, 1867, but the sale was stayed by the State court, and a motion was made by the bankrupt in that court to set aside the judgment, execution, and levy, but the motion was denied. On the commencement of the suit in the State court, an attachment was issued in it, under which the same stock of goods above mentioned had been attached. A motion was made by the bankrupt in the State court to dissolve that attachment, which motion was heard at the same time with the other motion before mentioned, and was also denied. After the denial of these motions, the sheriff advertised the goods for sale for the 22d of November, 1867. On the 21st of November, 1867, the petition in this matter, praying for an adjudication of bankruptcy, was filed, and this court, under the fortieth section of the Bankruptcy Act, at the time it made an order to show cause why the prayer of the petition should not be granted, issued an injunction restraining the sheriff from selling the goods under the execution on the levy made thereunder. There was afterwards an adjudication of bankruptcy in this matter. On a representation that the goods levied on were of a perishable character, and were deteriorating in value, this court made an order modifying the injunction so as to permit the sheriff to sell the goods under the execution, and directing the sheriff to hold the proceeds until the further order of this court concerning the same. The plaintiffs in the judgment now moved the court to dissolve the injunction wholly, and to allow the proceeds of the sale to be applied in paying the judgment and the costs and the charges and fees of the sheriff.

For the bankrupt, *D. McAdam.*

For the creditors and the sheriff, *D. McMahon.*

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BLATCHFORD, J. There is nothing shown to impeach the *bona fides* of the judgment, execution, and levy. No collusion in regard to them appears, and the bankrupt resisted them to his utmost. The lien of a levy made under an execution issued on a final judgment, such as is that in the present case, provided such lien attached before the commencement of the proceedings in bankruptcy, is preserved by the Bankruptcy Act, and is to be respected by this court, whether this court takes to itself the administration of the property on which the lien is imposed, and applies it towards the satisfaction of the lien, or whether it allows the State officer, who is executing the State process, to do so. In this case, the property has been sold, and the proceeds of it are in the hands of the sheriff. No advantage can result from requiring the money to be paid into this court, with a view to its application by this court in satisfaction of the lien on the property. An order will be entered allowing the sheriff to apply the proceeds of the sale of the property towards the discharge of the amount which he is required by the execution to make, including his charges and fees thereon, and directing him to pay the overplus, if any, to the assignee of the bankrupt, if there be one, and, if there be none, then to the clerk of this court, to the credit of the bankrupt's estate.



DECEMBER, 1867.

**THE PROPELLER MARY J. VAUGHAN AND THE  
STEAMBOAT TELEGRAPH.****DAMAGES IN COLLISION CASES.—LOSS OF CARGO.—PLACE OF SHIP-  
MENT.—CURRENCY.—INTEREST.**

The measure of damages for cargo lost by a collision, is its value at the time and place of its shipment.

Where cargo was put on board a canal boat, in Canada, to be carried to New York, and was lost in a collision on the Hudson River, the currency of the place of shipment being shown to be United States gold coin, and the cargo, in that coin, being shown to be worth a certain number of dollars :

*Held*, That the decree for damages must be for that number of dollars ;

That the interest must be allowed at the rate of six per cent. per annum.

This case came before the court on separate exceptions taken by each of the claimants of the two vessels sued, to the report of a commissioner. The libel was filed *in rem*, by the firm of Gordon, Bruce & McAuliff, merchants of the city of New York, as consignees of certain barley, against the two vessels, to recover damages for the loss of the barley, caused by a collision which took place on the Hudson River between Newburgh and Cold Spring in October, 1864, whereby a canal boat on which such barley was laden was sunk. The canal boat, in tow of the propeller, was on a voyage from Troy to New York. The steamboat was bound up the river, with barges in tow, one of which struck the canal boat so as to sink her. The barley was laden on board of the canal boat at St. Timothy, in Canada. On the hearing, the court decreed a recovery against both of the vessels sued, and referred it to a commissioner to ascertain and compute the amount of the damages sustained by the libellants. The barley was laden at St. Timothy, October 7th, 1864. Other barley, consigned to the same con-

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signees, was laden at the same place at the same time on board of another canal boat, which was in tow of the same propeller at the time of the collision, and arrived safely at New York, and was sold there for \$1.70 in currency per bushel of 48 pounds, about October 27th, 1864. On this basis, the commissioner fixed the value of the barley lost at \$1.70 per bushel, which, for 3,480 bushels, the quantity fixed by him, amounted to \$5,916.00. As the price of \$1.70 per bushel at New York, included, as an element going to make it up, the usual commission of  $2\frac{1}{2}$  per cent to the consignee, which he would have received for selling the barley, and the freight on the barley, the commissioner deducted from the \$5,916.00, the sum of \$147.90, for  $2\frac{1}{2}$  per cent commission on the \$5,916.00, and also the sum of \$676.51 for freight, being at the rate of  $19\frac{4}{10}$  cents per bushel, that is, 9 cents in gold per bushel, computing gold as worth 216 per cent. premium in currency at the time of the collision, the 9 cents in gold per bushel being the rate of freight which the canal boat was to receive for transporting the barley from St. Timothy to New York. These deductions left remaining the sum of \$5,091.59, on which the commissioner allowed interest to the date of his report, two years and six months, at the rate of 7 per cent. per annum, amounting to \$889.02. This addition of interest made a total of \$5,980.61, which the commissioner reported as the damages. To this report the claimants of both of the vessels sued excepted, on the ground that the commissioner erred in fixing the value at \$1.70 per bushel.

The claimants insisted that the commissioner should not have taken the value at New York or at the place of collision, but should have taken it at the place of shipment. The value at the time and place of shipment was shown to have been from 67 to  $72\frac{1}{2}$  cents per bushel of 48 pounds, in United States gold coin, which was the currency then in circulation at such place, and the cur-

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rency in which barley was then bought and sold there.\* The libellants insisted that the value at the place of shipment was what the commissioner did, substantially, in fact, take; but that he took it in the legal tender currency of the United States, by taking such currency value at New York, and deducting commission and freight computed in the same currency. The libellants also insisted that, as they sued here, they were entitled to have the damages computed in the current currency of the United States, and that, if such damages were computed in gold and were to be discharged in currency, they would not receive indemnity. The claimants insisted that they were entitled to have the damages computed at the value of the barley in the currency prevalent at the place of shipment, and that, as that currency was United States gold coin, and did not require to be converted into such coin, as would be the case with any other foreign currency, they were entitled to have the value in dollars so ascertained stated as the damages, without reference to any premium on gold, or to the fact that the claimants could discharge such damages in legal tender currency. The claimants further insisted that, even if the value in New York should be taken, it must be the value in gold, found by reducing the currency value stated by the commissioner to gold value according to the rate of premium on gold which ruled at the time at New York. That gold value they stated at 79½ cents per bushel.

For libellants, *S. E. Lyon.*

For the Vaughan, *C. Van Santvoord.*

For the Telegraph, *F. J. Fithian.*

BLATCHFORD, J. The law is well settled, that, in case a contract to deliver goods is broken, the party is enti-

bled to recover the full value of the goods at the place of delivery. And such value is to be computed in the currency prevalent at such place. This was the rule applied by Judge Shipman, in the case of *The Patrick Henry* (1 *Benedict's Rep.*, 392), cited in this court for the libellants. If, in this case, the action was on the bill of lading of the barley, for its non-delivery at New York, the proper rate of damages would be \$1.70 per bushel. But, in cases of loss of cargo by collision, or other tort, the rule is equally well settled, that the value of the lost property at the time and place of its shipment is the measure of damages. In a case of illegal capture as prize, where the property is wholly lost to its owner, the damages allowed are only the prime value, or invoice price, and interest, and no supposed profits or allowance of damages, on the basis of a calculation of profits (*Murray v. The Charming Betsey*, 2 *Cranch*, 64; *Maley v. Shattuck*, 3 *Cranch*, 458; *The Schooner Lively*, 1 *Gallison*, 315, 324 to 327; *Del Col v. Arnold*, 3 *Dallas*, 333; *The Anna Maria*, 2 *Wheaton*, 327; *The Amiable Nancy*, 3 *Id.*, 546, 560). The same rule of damages has been established by the Supreme Court for collision cases. In *Smith v. Condry* (1 *Howard*, 28), a collision occurred in the port of Liverpool. The plaintiff offered to prove, at the trial, that his vessel was laden with salt, and was so delayed in her voyage by the collision, that the salt was worth considerably less at her port of destination, when she arrived there, than it would have been worth if she had not been so delayed, and claimed to recover such difference as damages. The court excluded the evidence, and the Supreme Court held that the evidence was properly excluded, and that, in cases of loss by collision, the injured party could not recover for the loss of probable profits at the port of destination, and that the value of the property at the place of its shipment was the measure of compensation. That was the rule adopted by this court in the case of

*Adams v. The Ocean Queen* (before Judge Shipman, November, 1866), where the commissioner, in assessing the amount of damages caused to the cargo of a vessel by a collision, took as the measure the price it would have brought at the port of destination, instead of the price paid at the port of shipment. This court held that the proper measure was the value of the property at the port of shipment, with interest at the rate of 6 per cent. per annum, from the time of the collision. The Circuit Court, on appeal (September, 1867), affirmed this decision. As the commissioner, in the present case, did not adopt, as the measure of damages, the value of the barley at the port of shipment, in the currency then and there prevalent, the first exception of the claimants to his report is allowed. The second, third, fourth, fifth, sixth, seventh and eighth exceptions of the claimants to his report necessarily fall with the allowance of their first exception, and no decision is necessary as to the points involved in those exceptions. They are neither allowed nor disallowed, but are ordered to be stricken from the record.

The damages computed on the principles above set forth will amount to a certain number of dollars in the money of the United States, and the decree will be for that number of dollars. The case will stand the same as if the barley had been shipped from England, in which event the value of the barley there, in sterling money of Great Britain, converted into the coined money of the United States, at the commercial value of such sterling money at the time in such coined money, would be the legal measure of damages, the only difference in the present case being, that, as the currency prevalent in Canada is the coined money of the United States, it does not require to be converted into such coined money. The rule is the same as if the action were one for the breach of a contract to deliver the like quantity of barley at a foreign port, whether in England or in Canada.

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or for the breach of a contract for the payment of money, made abroad and to be performed abroad, in a foreign currency. In a case of the latter description, this court has held that the proper rule of damages is the commercial value of the foreign money in the coined money of the United States, without any allowance for any premium on such coined money (*The Blohm*, 1 *Benedict's Rep.*, 228). The fact that, under the Act of February 25th, 1863 (12 *U. S. Stat. at Large*, 345), the debtor can discharge a judgment entered for the amount of damages so ascertained by paying it in the United States notes or legal tender currency, without any allowance for any depreciation in the value of such currency or notes, cannot affect the question as to the proper measure of damages, or the proper mode of computing them. A debt contracted in the United States before such notes were made a legal tender, and payable in the United States, can be discharged by such notes, dollar for dollar, according to the tenor of the contract. Such is the law, and the privilege of so discharging any judgment which may be entered in this case for damages computed on the principles herein set forth, is one which the debtor is entitled to as an incident of the bringing of the suit in this forum. The creditor, if he comes into this jurisdiction to bring his suit, must accept the the right to sue with the incident.

The ninth exception of the claimants must be allowed, as the proper rate of interest was six per cent. per annum, and not seven.

An order must be entered disposing of the exceptions as above stated, and referring the case back to the commissioner to ascertain the damages on the principles above set forth, and report the same to the court.

DECEMBER, 1867.

## IN THE MATTER OF JAMES D. RAY, A BANKRUPT.

## STATUTE OF LIMITATIONS.—EXAMINATION OF BANKRUPT.

A debt, to be barred by limitation so as not to be provable in Bankruptcy, as not being "due and payable" according to the nineteenth section of the Bankruptcy Act, must be shown to be barred throughout the limits of the United States.

Before a creditor can, under the twenty-sixth section of that Act, apply for an order to examine the bankrupt, he must prove his claim; but, under the twenty second section, a creditor who has tendered proof of a debt, which has not been allowed, may also apply for such examination.

In this case, upon the day appointed by the register, on the application of Wheeler, Madden & Olemson, creditors, for the examination of the bankrupt and his wife and other witnesses, under section twenty-six of the Bankruptcy Act, the bankrupt objected to the examination, on the ground that the claim of those creditors was barred by the statute of limitations of the State of New York, and, in support of such objection, the bankrupt put in before the register an affidavit and plea, for the purpose of availing himself of the plea and defence of such statute. The facts were conceded by the creditors to be correctly set forth in the affidavit. The affidavit, which was made by the bankrupt, stated, that the claim of the creditors was filed with the assignee December 7th, 1867, the assignee having been appointed September 12th, 1867; that such claim was founded upon a note made by the bankrupt and another person, as copartners, dated at New York, May 1st, 1860, for \$747.14, payable in eight months after date, and upon a balance of account against said copartnership amounting to \$1,197.38, for merchandise purchased by it from said creditors prior

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to October, 1860 ; that the debtors and the creditors were all of them citizens of, and all of them resided within, the State of New York at the time such indebtedness arose or was contracted, and have thence continued and now are citizens of, and residents within, said State ; that the credit on said indebtedness expired, and the entire claim became due and payable, and so remained for more than six years before the filing of the original petition of the bankrupt herein ; that any right or cause of action accruing thereon against said copartnership or said bankrupt, did not accrue within six years next before the filing of said petition ; that, by reason thereof, the said claim is barred by the statute of limitations of the State of New York ; that the said note was made and delivered at New York, and was payable there, and the said merchandise was purchased there, and the claim of said creditors was contracted there ; that, by reason of said matters, the bankrupt took objection to all proceedings by said creditors or on their behalf in this matter, and made the affidavit and interposed the plea of said statute for the purpose of availing himself of such objection and of said statute as a defence and bar to said claim, or to its allowance as a claim, against his estate, and as a bar to the right of said creditors to have such examination ; and that the bankrupt had in no way or manner waived said objection. On the foregoing facts, and on the request of the parties, the register certified to the District Judge, for his opinion thereon, the following question : Has a creditor who has proved his debt, but whose debt is barred by the statute of limitations of the State of New York, as set forth in said affidavit and plea, a right to examine the bankrupt, under section twenty-six of the Bankruptcy Act.

BLATCHFORD, J. At the request of the parties, made through the register, the court consented to receive written briefs on the question certified in this case. A brief



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has been furnished on the part of the bankrupt, but none on the part of the creditors. The questions discussed on the part of the bankrupt are, whether the bankrupt is estopped from availing himself of the statute of limitations by reason of his having set forth the claim of the creditors in the schedule of creditors annexed to his petition; whether the bar created by the statute of New York cannot operate as a complete bar to the debt, unless it be also shown that the debt would be barred in all the States of the Union; and whether, this being a proceeding for the relief of the debtor, and the discharge he petitions for being a matter of concession and favor, he cannot interpose a technical defence or objection, or one that does not go to the equities between the parties.

It is argued, on the part of the bankrupt, that the placing by him of the debt upon the schedule to his petition is not a promise to pay the debt, or an admission of a willingness to pay it, or an admission that it is due, or an acknowledgment or recognition of its existence, or of an existing liability to pay it, from which a new promise may be inferred, the fact that the debt is named in a proceeding, the sole purpose of which is to obtain a discharge from all liability on the debt, being a circumstance calculated to repel the presumption of an intent or promise to pay the debt; that, under the facts in regard to this debt, the creditors cannot claim the benefit of the statute of limitations of any other State than New York; and that the right to a discharge on complying with the law is a legal right. The question certified is treated by the argument on the part of the bankrupt as identical with the question whether the claim in this case is provable under the Bankruptcy Act.

The twenty-sixth section provides, that the court may, on the application of "any creditor," require the bankrupt to submit to an examination upon, among other things, all debts claimed from him, and all matters concerning his property and estate. The twenty-second

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section provides, that the court may, on the application of "any creditor," "examine upon oath the bankrupt, or any person tendering, or who has made proof of claims, and may summon any person capable of giving evidence concerning such proof, or concerning the debt sought to be proved, and shall reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality, or mistake." Before a creditor can, under section twenty-six, apply for an order to examine the bankrupt he must prove his claim. The words, "any creditor," in that section mean any creditor who has proved his claim. It is true, that the examination under that section may extend to an examination concerning the claim itself. But an examination of the bankrupt, when desired, in regard to a claim proved or sought to be proved, can take place under the twenty-second section; and the words, "any creditor," in the last clause of that section, must, from the language of the whole section, be held to mean not only a creditor who has proved his debt, but a creditor who has tendered proof of a debt which has not yet been allowed, so as to authorize the latter, as well as the former, to apply for an examination under the twenty-second section. The order for the examination in the present case is stated to have been made under the twenty-sixth section, and I must intend that it was not to be merely an examination in reference to the debt claimed by these creditors. As their debt had been proved, they had a right, under section twenty-six, to apply for the order. The debt being proved, and the order being made, the creditors have a right to proceed with the examination.

The twenty-third section requires the court to allow all debts duly proved. But, under the provision in the twenty-second section, before quoted, the court is required to reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality, or mistake. The claim of these creditors must stand as

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proved until it is rejected, either as not having been duly proved or as having been founded in illegality or mistake. If the bankrupt desires to have the claim rejected for any such reason, he must apply to the court by petition, and a reference will be ordered under section thirty-eight, to make the examination provided for by section twenty-two.

I might content myself with answering the question certified, by saying that a creditor who has proved his debt has a right to examine the bankrupt under section twenty-six of the Act, although his debt may appear to be barred under the circumstances set forth in this case. But what is really desired by the parties is a decision whether the debt in this case is one which ought to be rejected as being barred by the statute of limitations of New York.

The Bankruptcy Act is silent as to the operation of any statute of limitation. The nineteenth section provides, that "all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy," may be proved against his estate. This language is broad enough, on its face, to include all debts, no matter of how long standing. I have not met with any decision under any former Bankruptcy Act of the United States on the question presented. But in England it has always been held, under the bankruptcy law, that a debt which cannot be recovered in an action, against a plea of the statute of limitations, cannot be proved in bankruptcy (*Ex parte Dewdney*, 15 *Vesey*, 479; *Re Clendining*, 9 *Irish Eq. R.*, new series, 287). And in England a dividend paid on such a debt was ordered to be repaid (*Ex parte Dewdney*, *ubi supra*). The principle involved is, that the debtor is under no obligation to pay such a debt, and that, therefore, it cannot be said to be "due and payable." The rule in England continues to be the same, and the ground on which it is put by elementary writers is, that the bankrupt has no option as to defending or

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not defending a claim against his estate in bankruptcy, save through the action of the assignee, and the assignee is bound, in the interest of the body of creditors, to set up any legal defence which the bankrupt could have set up if he were not bankrupt (1 *Archbold's Law of Bankruptcy*, by Griffith & Holmes, edition of 1867, p. 533; 2 *Doria & Macrae's Law and Practice of Bankruptcy*, p. 787). I think that is the proper rule, and that, under section nineteen of the Bankruptcy Act, no debt can be considered "due and payable" which is barred by limitation, and that a debt so barred cannot be proved in bankruptcy.

Is the debt in the present case so barred? The Code of Procedure of New York provides (*sections* 74, 91), that a civil action on causes of action such as those in this case, can only be commenced within six years after the causes of action accrued, but that the objection that the action was not commenced within the time limited can only be taken by answer. The whole scope of the statute is one affecting the remedy merely, and not the contract. A complaint setting out a cause of action which appears to have accrued more than six years before the action was commenced, is not objectionable on its face or open to a demurrer. The defence of the limitation must be set up by answer. If it is not so set up, it is waived. Now, the distinction between a law which affects the rights and merits of a contract, and extinguishes it and makes it null and void as the result of a prescription or limitation, and a law which does no more than limit the time within which an action must be brought upon the contract in the courts of the country which enacts the law, is well settled. A law of the latter description is wholly confined to the country enacting it. A law of the former description may, under certain circumstances, so affect the contract and its construction as to be capable of being invoked as a bar to an action on it in another country (*Huber v. Steiner*, 2

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*Bingham's N C.*, 202; *Story's Conflict of Laws*, § 582). The statute of limitations of New York goes exclusively to the remedy in the courts of New York, and could never be invoked as a bar to an action in another State on the contracts in question in this case. This principle is sought by the creditors in this case to be applied to their claim, and they insist, that, as they would have a right, notwithstanding anything found in the law of New York, to sue the bankrupt on their claim if they find him within the jurisdiction of another State, they ought not to be deprived of the privilege of proving their claim in bankruptcy under a law of the United States, whose operation is co-extensive with the limits of the United States, unless it is shown that the claim is barred throughout the limits of the United States. The English bankruptcy law is co-extensive, as to territorial operation, with the English statute of limitations. The Bankruptcy Act of the United States operates in all the States as well as in New York. Under these circumstances, I think, that a debt, to be barred by limitation, so as not to be provable under the Bankruptcy Act, as not being "due and payable," must be shown to be so barred throughout the limits of the United States. I am the less reluctant to hold this view, because a contrary rule would have an effect which the counsel for the bankrupt in this case seems to have entirely overlooked. By section thirty-two of the Bankruptcy Act, a discharge under it discharges the bankrupt from all debts and claims which are by the Act made provable against his estate (except such as are excepted by section thirty-three); and, by section thirty-four, it is declared, that the discharge shall, with such exception, release the bankrupt "from all debts, claims, liabilities and demands which were or might have been proved against his estate in bankruptcy." If it be held that the debt in this case cannot be proved against the estate, it will not be discharged, and it will stand against the bankrupt. If he

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In the Matter of James D. Ray, a Bankrupt.

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shall hereafter be sued on it in another State, the discharge in bankruptcy will be no defence to such suit, if it appears that, on a direct adjudication, the creditors were refused permission, by the court in bankruptcy, to prove their claim, on the ground that it was not provable because it was barred by the statute of limitations of New York, and that statute will be no defence to such suit. The effect of applying, in this case, the views contended for on the part of the bankrupt, would be very disastrous to his interests. The schedules to his petition disclose the names of 324 creditors, whose aggregate debts, as set forth therein, amount to over \$120,000. Of these creditors, 235 are set down as residing in the State of New York. Of the entire amount of debts, some \$30,000 have been put into the shape of judgments. The rest appear to have been all of them past due for more than six years at the time the petition in bankruptcy was filed, and to be simple contract debts. The same rule that would exclude the debt in question here from being provable, would exclude others, probably the debts of all the 235 creditors who reside in New York, possibly the debts of all the 324, except those in judgment. Thus the bankrupt would, by his discharge, secure a discharge from but a meagre fraction of his debts. In the present case, 10 debts have been proved, amounting, in the aggregate, including the debt in question here, which is proved at \$2,897.29, to a little over \$13,500. These debts are all of them in the same category. They are simple contract debts, not in judgment, and were all of them due and payable more than six years before the filing of the petition in bankruptcy in this case. If they should be held to be not provable against the estate of the bankrupt because they were barred by the statute of limitations of the State of New York at the time such petition was filed, and yet should be held, under section thirty-four of the Act, to be discharged by a discharge in this case, because they were in fact proved against the estate, and

all the other unproved simple contract debts should be held not to be discharged because they were not proved, and because, having been due and payable for more than six years before the filing of such petition, they were not provable, the result would be that the debts in judgment, amounting to \$30,000, and the debts proved, amounting to \$13,500, would be discharged, while the remainder of the debts, amounting to nearly \$80,000, would be unaffected by the discharge. This is certainly a result which the bankrupt cannot be supposed to be aiming at by his proceedings in bankruptcy, or by taking the objection that the debt in question here is not provable against his estate. And yet it is a result which must inevitably follow, if the views urged on his behalf are sound. I do not think that any interpretation of the Act ought to be admitted which can work out any such result, if any other interpretation is fairly to be deduced from its provisions. It is not to be presumed that a beneficent statute like this, which was designed to restore to the pursuits of trade and business, for the benefit of the whole country, energies which have been crippled by misfortune, is so hampered in its operation as not to extend to the discharging of a simple contract debt which has been past due for more than six years. The provision in section nineteen, that "all debts due and payable from the bankrupt" may be proved, is broad enough to include all debts, no matter how old, for the recovery of which, but for a discharge under the Act, the bankrupt can be sued anywhere within the territory where the discharge will operate; and no provision is found in the Act which destroys the provability of a debt because it is barred by the statute of limitations of one State.

These views dispose of the question presented in the certificate from the register, without the necessity of deciding on any of the other points raised. But I ought to say, that I am not satisfied, that the setting forth of a debt in a schedule to a voluntary petition in bankruptcy,

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can have the effect of destroying a bar which has come into operation in regard to the debt by virtue of a statute of limitations.

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DECEMBER, 1867.

IN THE MATTER OF WILLIAM E. TOWNSEND,  
A BANKRUPT.

NOTICE OF MEETINGS OF CREDITORS.—CERTIFICATE OF SERVICE BY  
THE CLERK.

Where the clerk of the bankruptcy court certifies, in due form, under the seal of the court, that copies of a notice for a meeting of creditors, "were duly mailed to each creditor," that is sufficient evidence of what is so stated, even though it is made to appear that a notice was mailed by the clerk to one of the creditors, naming a different day from the day fixed.

In this case, the meeting of the creditors to show cause was fixed for December 27th, 1867, by an order dated December 2d, 1867. The solicitor of the bankrupt appeared before the register at that time, and produced a notice which had been served by the clerk upon one of the creditors who had proved his debt, in which the day of the meeting was stated to be December 2d, and moved for an order fixing the meeting at a future day.

The register decided that, as the clerk of the court, under the seal of the court, had certified, in due form, that copies of a notice annexed to the certificate, in which notice the day of meeting was correctly stated, "were duly mailed to each creditor," that certificate was conclusive. But, at the bankrupt's request, he certified the question to the court.

BLATCHFORD, J. The certificate of the clerk to the effect stated is sufficient evidence of what is so stated.



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Twenty-eight Cases, marked M. & B., containing Wine.

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DECEMBER, 1867.

TWENTY-EIGHT CASES, MARKED M. & B.,  
CONTAINING WINE.

## REVENUE LAWS.—REAPPRAISEMENT.—EVIDENCE.

Revenue laws are not penal in the sense that requires them to be construed with great strictness in favor of defendants.

There cannot be a reappraisement, on appeal, of imported goods, unless there has been an entry of the goods.

Therefore, where, on the trial of an action to forfeit goods for alleged undervaluation, no invoice or entry of the goods was proved, but it appeared that papers purporting to be an invoice and entry had been in the possession of the District Attorney, but had disappeared, and it also appeared that the goods had been appraised at the Custom House, but the papers on such appraisement had also disappeared, and that an appeal was taken from that appraisement, on which appeal a reappraisement was had, the papers on which were proved :

*Held*, That it was not error for the court to tell the jury that they had a right to presume, from the evidence, that there was an entry of the goods.

This was a motion for a new trial on the ground of alleged misdirection by the court to the jury. The case was a libel of information on a seizure for fraudulent undervaluation in the invoice of twenty-eight casks of wine, imported in the ship *Emma*, from Rotterdam. No entry or invoice was put in evidence. It appeared that two papers, purporting to be an entry and an invoice in the case, had been in the possession of the District Attorney, but had disappeared, and, on proper search, could not be found either in his office or in the Custom House. It also appeared, that an appraisement of the wine, in the usual manner, had been made in the Custom House, but that the papers on such appraisement had also disappeared, and could not be found. An appeal was taken from that appraisement, and a reappraisement was made by the general appraiser and a merchant appraiser, January 10th, 1865, with the aid of experts as witnesses.

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In the Matter of William E. Townsend, a Bankrupt.

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can have the effect of destroying a bar which has come into operation in regard to the debt by virtue of a statute of limitations.

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DECEMBER, 1867.

IN THE MATTER OF WILLIAM E. TOWNSEND,  
A BANKRUPT.

NOTICE OF MEETINGS OF CREDITORS.—CERTIFICATE OF SERVICE BY  
THE CLERK.

Where the clerk of the bankruptcy court certifies, in due form, under the seal of the court, that copies of a notice for a meeting of creditors, "were duly mailed to each creditor," that is sufficient evidence of what is so stated, even though it is made to appear that a notice was mailed by the clerk to one of the creditors, naming a different day from the day fixed.

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The official papers on such reappraisement were put in evidence. The invoice value was 1,870.56 florins, the appraised value 2,364.07 florins, and the reappraised value 2,282.27 florins. The chief clerk in the general appraiser's office testified, that he made up such official reappraisement papers from the original invoice which he had before him at the time, and that such invoice came to him as a part of the papers on the appeal from the appraisement. One of the claimants testified, that the claimants Meyer & Baer received the wine and unloaded it and put it in their cellar; that he visited the Custom House in relation to the wine; and that he presumed it was entered at the Custom House, although he was on his way from Europe when the wine arrived.

The forfeiture of the goods was claimed under the sixty-sixth section of the Act of March 2d, 1799 (1 *U. S. Stat. at Large*, 677), the fourth section of the Act of May 28th, 1830 (4 *Id.*, 410), and the first section of the Act of March 3d, 1863 (12 *Id.*, 738). The sixty-sixth section of the Act of March 2d, 1799, provides for the forfeiture of goods entered on a fraudulent invoice, and makes an entry a prerequisite to a forfeiture. The fourth section of the Act of May 28th, 1830, is to the same effect in substance. The first section of the Act of March 3d, 1863, provides for the forfeiture of goods entered or attempted to be entered by means of any false or fraudulent paper. Therefore, in the present case, it was necessary there should have been an entry, or an attempt at an entry, of the goods.

The court charged the jury that they had a right, from the evidence, to presume that there was an entry, although there was no direct evidence of one. The jury found a verdict for the Government, condemning the goods, and the claimants now moved for a new trial, on the ground that the court erred in such instruction in regard to the entry.

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Twenty-eight Cases, marked M. & B., containing Wine.

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For the United States, *B. K. Phelps*.

For claimants, *M. V. B. Wilcoxson*.

BLATCHFORD, J. By the revenue laws, it is necessary that an invoice should be presented to the collector at the time of entry. In this case, an invoice was found in the possession of the Custom House, and, although it was not produced, its loss and contents were proved. The fact that the officials had an invoice of the goods might not, of itself have been sufficient evidence on which to presume an entry, even though an appraisement of the goods had been shown. For an appraisement may be had as well of goods which are not entered or invoiced, as of those which are. But no reappraisement on appeal can take place unless there is a previous entry, followed by an appraisement. The fact of reappraisement is, therefore, *prima facie* evidence of an entry, sufficient to throw the burden of proof on the claimant to show that there was no entry, and to warrant the jury in finding in favor of the presumption that there was an entry, if no opposing evidence is offered (1 *Greenleaf's Evidence*, §§ 33, 34). The officers of the customs would have failed in their duty if they had allowed a reappraisement, on an appeal by the importer, unless he had previously made an entry of the goods. It is a presumption of law, that all public officers perform their proper official duties until the contrary is proved; and, where a reappraisement is to be made only upon its appearing to the collector that there has been a previous entry of goods, the fact that the reappraisement has taken place, is *prima facie* evidence that the previous entry was made (*The Philadelphia and Trenton Railroad Co. v. Stimpson*, 14 *Peters*, 448, 458; *Turner v. Yates*, 16 *Howard*, 14, 26).

I think that the instruction to the jury was correct, and that the motion for a new trial must be denied.

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Twenty-eight Cases, marked M. & B., containing Wine.

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Revenue laws are not penal laws in the sense that requires them to be construed with great strictness in favor of the defendant. They are rather to be regarded as remedial in their character, and intended to prevent fraud, suppress public wrong, and promote the public good, and they should be so construed as to carry out the intention of the legislature in passing them, and most effectually accomplish these objects (Oliquot's Champagne, 3 Wallace, 114, 145). In the present case, it was perfectly open to the claimants to rebut the *prima facie* evidence of an entry, by showing that none had been made, but they offered no evidence of the kind. The jury, on a submission of the question to them, found that there was an undervaluation in the invoice, and that it was fraudulent, and I see no reason to disturb the verdict.

Motion denied.

## Eastern District of New York.

DECEMBER, 1867.

### THE SHIP HELEN R. COOPER AND THE STEAMTUG R. L. MABEY.

COLLISION.—TOW.—ICE.—GUARANTY.

No vessel can lay aside extraordinary care, where the circumstances are extraordinary, without making herself liable for any damage that ensues in consequence.

Where a ship was being towed to sea by a single tug, when floating ice made the navigation difficult, and ran into a vessel lying at a pier, which she claimed was caused by the movement of a ferry-boat in suddenly crossing the bows of the tug and causing her to stop, and thus causing the ship to sheer :

*Held*, That on the pleadings and proofs that defence was not made out.

That as it appeared in evidence, that if another tug had been employed the ship could have been controlled, the failure to adopt that precaution was a fault which rendered her liable.

That the tug, having alleged acts of negligence on the part of the tow as the cause of the collision, of which she gave no evidence, must be held liable also.

She was negligent in attempting to tow the ship alone under the circumstances.

That the fact, that before setting out the tug exacted of the ship an agreement to assume all the risk, cannot relieve the tug from liability to an innocent third party.

THIS was an action brought by the owners of the ship J. F. Chapman against the ship Helen R. Cooper and the tug R. L. Mabey, to recover the sum of \$18,500 damages caused by a collision which occurred in the harbor of New York, on the 17th of January, 1866.

At the time of the accident, the Chapman was moored at Pier 45 in the East River, inside the pier, and while there was run into by the Cooper, then being towed to sea by the Mabey, at the end of a hawser. There was at the time little or no wind. The tide was running ebb, and the river was greatly obstructed by masses of ice moving down with the ebb tide.

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The Helen R. Cooper and The R. L. Mabey.

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No fault was charged upon the Chapman by either party.

For libellants, *Benedict & Benedict*.

For the Cooper, *Beebe, Donohue & Cooke*.

For the Mabey, *Emerson & Goodrich*.

BENEDICT, J: The two vessels proceeded against in this action have interposed separate defences; that of the ship will be first considered. The amended answer, filed in behalf of the ship, sets forth that she left her berth at the Shin-bone stores, on the Brooklyn side of the East River, on the day in question, in tow of the tug Mabey; that while being towed successfully, in such a way as to bring her head directly down the river, a ferry-boat suddenly and improperly crossed the bows of the tug, and, in order to avoid striking the ferry-boat, the tug was necessarily suddenly slowed, whereby the ship, being deprived of her towing power but having headway, shot in toward the piers, and, although both anchors were let go, ran into the Chapman before she could be stopped. And it is insisted that these circumstances make the case one of inevitable accident, for which the Cooper cannot be held liable.

The evidence in support of this defence I have examined with care, and find it vague and unsatisfactory. No witness is able to describe the ferry-boat spoken of, or seems to know where she came from or where she was going. The master of the ship and the pilot in charge are in conflict, as to the course taken by this ferry-boat. No witness is produced from any such ferry-boat, nor from the shore, nor from the tug, who testifies to the presence of any ferry-boat. Furthermore, the answer of the tug, which vessel would be nearest to the ferry-boat and best acquainted with the fact that her headway was



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The Helen R. Cooper and The R. L. Mabey.

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stopped by a ferry-boat, if such were the fact, and most interested to give a reason for her stoppage, does not allude to any ferry-boat as causing the disaster or even being present, but distinctly sets forth acts of negligence on the part of the Cooper, which it avers were the sole cause of the collision. Besides this, the original answer of the Cooper herself, filed soon after the occurrence, does not speak of any ferry-boat, but charges the collision to have been caused by an immense field of ice, which it avers caught both ship and tug, and carried them over to the New York side and into the Chapman; while the master of the Cooper, when called, on the day of the collision, to account for its occurrence, assigned no such reason as the presence of a ferry-boat.

In such a posture of the pleadings and evidence, it cannot be held that the collision was the result of a sudden movement of a passing ferry-boat. On the contrary, I am satisfied that the cause of the collision must be held to have been negligence on the part of the ship in undertaking to go to sea, on an ebb tide and in running ice, with a single tug. The condition of the harbor was not an ordinary one. Large masses of ice were moving in it, and at this time of tide in this locality no vessel could move without danger. The Chapman herself, although entirely ready for sea, with her crew on board, and although it was Saturday, remained at her pier because of the dangerous condition of that portion of the harbor.

In the face of a peril clearly to be foreseen, the Cooper set out with a power inadequate to cope with the peril, should it arise. The proof is positive that, if another tug had been alongside of the ship, no disaster would have occurred, and this common precaution should have been adopted by the Cooper. Had she adopted it her course could have been nearer the middle of the river, and any sheer of the ship could have been controlled. The failure to adopt this precaution I

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The Helen R. Cooper and The R. L. Mabey.

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consider to have been, under the circumstances, a fault which must render her liable.

No vessel can lay aside extraordinary care, where the circumstances are extraordinary, without making herself liable for any damage that ensues in consequence. (*MacLachlan on Ship.*, p. 281.)

The remaining question as to the liability of the tug is not a very material one, inasmuch as it appears, by a stipulation filed in the cause, that the claimants of the ship have assumed the defence of the tug, and undertaken to satisfy any decree which may be rendered against her.

The defence set up by the answer of the tug is not inevitable accident; on the contrary, it sets forth specific acts of negligence on the part of the ship, which alone, it avers, caused the collision. This defence there has been no effort on the part of the tug to prove. In the absence, then, of any testimony to sustain her answer, and upon the evidence in the cause, she must be held liable as a co-trespasser with the ship. She was clearly negligent in undertaking, single-handed, to tow a ship like the Cooper in the then condition of the harbor. It is true that it appears in evidence that before setting out she insisted upon a guarantee from the ship to assume all the risk; but this cannot relieve her from liability to an innocent third party whose vessel was injured, in a collision caused by the lack of power in the tug to keep the Cooper in the proper track and off from the piers.

A decree must accordingly be entered against both vessels proceeded against, with a reference to ascertain the amount.

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In the Matter of Justus S. Redfield, a Bankrupt.

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DECEMBER, 1867.

IN THE MATTER OF JUSTUS S. REDFIELD, A  
BANKRUPT.

## LIMITATION OF COSTS.—MISSTATEMENT IN PETITION.

Where a bankrupt applied, under the 30th Rule, for an order that the costs should not exceed the sum deposited with the clerk, and, on being examined, testified to certain sums, expended by him for his subsistence during the past year, all of which were borrowed and still unpaid, but his petition contained no statement of such indebtedness:

*Held*, That if his testimony was true, no discharge could be granted on his petition in its present condition.

That the present application must be denied.

BENEDICT, J. This is an application on the part of the bankrupt, under the 30th Rule, for an order directing that the costs and fees of his proceedings should not exceed the sum deposited with the clerk under the act. Under what is deemed a proper practice upon all applications of this description, the petitioner was directed to appear and be examined orally as to his inability to pay costs, and also as to the extent of his actual interest in the amount of the costs. The petitioner, being examined accordingly, testifies, among other things, to certain sums expended by him for his subsistence during the past year, all which he declares to have been borrowed, and to be still unpaid. His petition, however, which is also sworn to, and purports to set forth all his indebtedness, makes no disclosure of any such indebtedness. If, then, the testimony, upon which this application is based, is true, no discharge could be granted upon the petition in its present condition. It may be that the omission in the petition was the result of mistake, but it cannot be allowed to pass unnoticed. Petitions in bankruptcy

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In the Matter of Isaac Clarke, a Bankrupt.

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must be full, and be true in point of fact ; otherwise, no discharge will be granted.

The application to proceed upon the petition *in forma pauperis*, in the present position of the proceedings, must accordingly be denied.

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DECEMBER, 1867.

IN THE MATTER OF ISAAC CLARKE, A BANK-  
RUPT.

REGISTER'S COSTS.

BENEDICT, J. A register is not entitled to five dollars upon the adjournment of an examination, as for "a day's service while actually employed under the especial order of the court," where, on the application of an opposing creditor, an order has been made by the register that the bankrupt attend and be examined before him, and on the day fixed the bankrupt appeared, but the opposing creditor was not ready, and accordingly the examination was adjourned.

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DECEMBER, 1867.

IN THE MATTER OF FRANCIS SCHNEPF, A  
BANKRUPT.

STATE COURT.—JUDGMENT.—FRAUD.—LIEN.—POWER OF THE COURT.

Where a suit was commenced in a State court against the bankrupt, and the judgment was entered and execution issued, and a levy made by the sheriff before the petition in bankruptcy was filed:

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In the Matter of Francis Schnepf, a Bankrupt.

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*Held*, That on the facts the judgment was not fraudulent.

That therefore the judgment creditors, by their levy, acquired a security for their debt in the property, which is not invalidated by the bankruptcy act.

That as it appeared that the property levied on would bring more money if sold by the assignee in bankruptcy at private sale than if sold by the sheriff under the execution, and as no objection was made by the creditors to the taking of such a course, the assignee must take the property and sell it, with leave to the judgment creditors to apply for an order directing payment of their judgment out of the proceeds.

Whether the court has power to direct an assignee to take property out of the hands of a sheriff who holds it under such a levy, except by consent—*Quere*.

This was an application to set aside an injunction heretofore granted. The bankrupt filed his papers on the 9th of October, 1867, and was declared a bankrupt, and procured an injunction prohibiting creditors named Cammeyer & Mason from enforcing a levy, which the sheriff had made upon Schnepf's property under a judgment against him which they had obtained in a State court. They now moved to set aside that injunction. The affidavits on behalf of the bankrupt showed that he had prepared his papers to take the benefit of the act in September, 1867; that the summons in the suit of Cammeyer & Mason was served on him on September 17; that after that service he sent to them showing them the state of his affairs, and offering them a compromise of their debt at forty cents on the dollar, telling them that he should go into bankruptcy if they did not take it; that on the 8th of October he sent again to them, and they requested till the next day to consider it, and gave him to understand that they would not proceed in their suit in the mean time; but on that afternoon they entered judgment against him by default, and issued execution, on which the sheriff made the levy that night, and Schnepf filed his petition in bankruptcy the next morning.

BENEDICT, J. This is a motion in behalf of judgment creditors of a bankrupt to dissolve an injunction

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In the Matter of Francis Schnepf, a Bankrupt.

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heretofore issued by this court, restraining them from proceeding to sell under an execution certain personal property, levied upon prior to the filing of the petition in bankruptcy. The motion is opposed by the bankrupt, on the ground that the judgment under which the judgment creditors seek to proceed, was obtained in fraud of the Bankruptcy Act, and by the assignee in bankruptcy, on the ground that the title of the property in question is vested in him as an officer of the court, and no person can be permitted to dispose of or interfere with it, except under the order of the Bankrupt Court, to which the property has been transferred by operation of law. The facts attending the judgment are so fully spread out in the papers before me, and are so simple in their character, that I can without injustice dispose of the question as to the validity of the judgment on the affidavits alone. Upon that question I should gladly hold in favor of the bankrupt if I could do so, as I by no means approve of the manner in which the judgment was obtained ; but I do not see how the judgment can be held fraudulent upon the facts. It was obtained in the regular course of judicial proceedings, instituted adversely to the debtor and without collusion. It was entered for an amount admitted to be justly due, and the entry was made as it was, not with the assent of the debtor, but in spite of him. It is in law a valid judgment obtained without fraud or collusion, and can in no proper sense be said to have been procured by the bankrupt with a view to give a preference. This being so, the judgment creditors, by their levy made prior to the filing of the bankrupt's petition, acquired a security for their debt in the property levied on.

The next question arising is whether such a security is invalidated by the provisions of the Bankruptcy Act, and upon this question I have heretofore had occasion to express an opinion which I see no reason to modify. It seems to me that such a security is pre-

served and entitled to be protected, upon general principles of law, and that the general scope of the Bankruptcy Act indicates that such was the intention of the framers of the act (*Parker v. Muggridge*, 2 Story, p. 343).

The remaining question, then, is as to the manner in which this right of the judgment creditors shall be protected. Two methods are open, by either of which the debt will be secured. One is to allow the creditors to proceed to sell the property at sheriff's sale, in which case, as the affidavits show, there will be little or no surplus for the other creditors. The other is to direct the assignee in bankruptcy to take possession of and sell the property at private sale, in which case, as also appears by the affidavits, a sum can be realized not only sufficient to pay the judgment, but to leave a considerable sum for the other creditors. As between these two methods upon such a state of facts, it cannot be doubted that it is the duty of the Bankrupt Court, charged as it is with the interests of all the creditors, to prevent the sacrifice of this property by a sheriff's sale, and direct a sale by the assignee, provided the power to do so has been conferred by the act. A discussion of the question of the power of the court in the premises is rendered unnecessary in this case, inasmuch as the power is conceded to exist by the judgment creditors, and no objection is made to a disposal of the property by the assignee instead of the sheriff. I postpone, therefore, the discussion of that point until a case shall arise where it is raised, with the remark that such a power seems necessary to a proper administration of the bankrupt law, and that it would seem to be fairly included in the power conferred by the act to collect all the assets of the bankrupt, to ascertain and liquidate all liens or other specific claims thereon, to adjust priorities and marshal and dispose of the different funds and assets so as to secure the rights of all persons and the due distribution of the assets among all the creditors. The motion to dissolve the injunction will therefore be denied,

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A lot of Leaf Tobacco, &c.

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and an order entered directing the assignee to take possession of the property levied upon and sell the same, without delay, and to the best advantage, with liberty to the judgment creditors, immediately upon such sale, to apply for an order directing the payment of their judgment out of the proceeds of such sale.

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DECEMBER, 1867.

## A LOT OF LEAF TOBACCO, &amp;c.

## INTERNAL REVENUE.—BONDING PROPERTY.—TAX TO BE PAID INTO COURT.

Where property was seized as forfeited for an alleged violation of the Internal Revenue Law, and the claimant applied for a delivery to him of the same upon a bond:

*Held*, That as the application was one for a favor, terms might be imposed.

That the property might be delivered to the claimant, on his giving stipulations in the appraised value of the property, less the amount of tax due on it, paying this latter amount in money into the registry of the court.

BENEDICT, J. This is an application on the part of the claimant of certain tobacco, machinery, tools, &c., seized as forfeited to the United States, for an order to release the same upon a stipulation for value. An appraisement of the property has been made in accordance with the rules of court, and the value of the tobacco in the market, as tobacco on which the tax had been paid, has been reported by the appraisers. The questions raised are, whether the stipulation should be for the value of the tobacco, including or excluding the tax, and what provision, if any, should be made in regard to the tax. The proposition of the claimant is to include the tax in the value of the property, and, upon his incorporating into the ordinary stipulation for value



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A lot of Leaf Tobacco, &c.

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a provision which would enable the Government to enter a decree upon it for the amount of the tax, notwithstanding the acquittal of the property, if that should be decreed, upon the charges in the information, to receive the property as free from tax. What should be the proper order to make in regard to the tax upon this property, in the event of a verdict in favor of the claimants, and upon the entering of a decree of restitution, it is not necessary now to decide. The application of the claimant here is for leave to take the property into his own possession and control, pending the determination by the court of the question of its forfeiture or restitution. This property, it should be noticed, is now in the absolute custody of the marshal, and, if now surrendered by him, will not be delivered into the custody of a collector, who can hold it until the payment of the tax, but to the claimant, without any security for the payment of the tax, except such as may be exacted by the court. Upon such an application, being, as it is, an application for a favor, terms may be imposed; and I think it not unreasonable, if indeed it be not necessary in order properly to protect the Government, to require, as a condition of the delivery, that the portion of the appraised value of the tobacco, which represents the tax, shall be paid, in money, into the registry, to insure the liquidation of the tax in case of an acquittal of the property upon the charge in the information. The possession of this property must, in the ordinary course of law, remain in the Government until that possession be changed by a decree of restitution. The Government, being thus now in possession of the tax, in the property which represents it, cannot, certainly, in the absence of a decree of restitution, be asked to surrender that possession.

A further question has been raised in this case, since the submission of the motion, by the application of the district attorney for leave to withdraw his consent to a

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In the Matter of Benjamin F. Metcalf and Samuel Duncan, Bankrupts.

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delivery of the property, upon which consent the motion had been originally based; and in support of this application, as well as to show that the public interest requires that none of the property seized shall be delivered upon bail, affidavits have been received. The affidavits produced in reply, on the part of the claimant, are, however, very full, and satisfactorily explain the circumstances relied on by the Government, and make out a case where the favor asked may well be granted, provided the security be such as to be satisfactory to the district attorney. An order may, therefore, be entered, allowing the claimant to receive the property, upon giving stipulations in the appraised value of the property, less the amount of the tax, which last amount must be paid in lawful money. The stipulations to be executed by two sureties, residents and freeholders in the city of Brooklyn, and satisfactory to the district attorney.

For the Government, *B. F. Tracy, U. S. District Attorney.*

For claimant, *W. H. Hollis.*

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DECEMBER, 1867.

IN THE MATTER OF BENJAMIN F. METCALF  
AND SAMUEL DUNCAN, BANKRUPTS.

STAYING PROCEEDINGS IN STATE COURTS.—APPEAL.

A judgment in a State court against a bankrupt, which has been duly appealed from by him, is not a final judgment under the twenty-first section of the Bankruptcy Act.

The prosecution of the case, under such appeal, is forbidden to the creditor by that section.

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In the Matter of Benjamin F. Metcalf and Samuel Duncan, Bankrupts.

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A motion to compel the bankrupt to furnish new security on such appeal, or abandon the appeal, is embraced within that prohibition.

This case came before the court upon a petition filed by Henry D. Brookman and John U. Brookman, for relief from an injunction issued by this court restraining all proceedings in a certain cause pending in the Court of Appeals of the State of New York, wherein the petitioners were plaintiffs, and one of the bankrupts the defendant. It appeared that the case had been tried, and judgment given for the plaintiffs, which judgment had, however, been appealed from by the defendant, who had given security upon such appeal, as required by law. It also appeared that one of the sureties upon the appeal had become insolvent, and the plaintiffs had, since the commencement of the proceedings in bankruptcy, given notice of a motion to compel the bankrupt to furnish new security, or abandon his appeal; whereupon the bankrupt obtained from this court, in which his petition in bankruptcy had been filed, an injunction staying all proceedings in the cause referred to, which injunction the plaintiffs in that cause now asked to have dismissed.

For the motion, *Owen, Nash & Gray.*

In opposition, *Emerson & Goodrich.*

BENEDICT, J. The twenty-first section of the Bankruptcy Act declares that "no creditor whose debt is provable under this act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined." This is a very clear provision, the object of which is to prevent a race of diligence between creditors, and to protect the bankrupt from being harassed with suits pending the question of his discharge. It seems to apply to all cases where the

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In the Matter of Benjamin F. Metcalf and Samuel Duncan, Bankrupts.

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personal liability of the debtor is sought to be fixed or ascertained by a final judgment pending the determination of the question of his discharge, and, in my opinion, it applies to a case like the present, where an action against one of the bankrupts is pending in the Court of Appeals of the State, to which an appeal had been taken by him prior to the filing of the petition in bankruptcy. In such a case there is no final judgment within the meaning of the Bankruptcy Act; the debtor's liability has not been finally determined, and there being no final judgment, the Bankruptcy Act declares that the suit shall stop, pending the determination of the question of the bankrupt's discharge. This option to endeavor to obtain a discharge in bankruptcy, and, failing in that, to defend all undetermined personal actions, is a right given a debtor by the Bankruptcy Act under the Constitution of the United States, and he is entitled to be protected in that right by this court. But it is said that the motion for further security, which has been noticed by the creditor in the actions pending in the Court of Appeals, is not strictly a proceeding against the bankrupt. I think otherwise. It is just the proceeding which will compel the bankrupt to determine, pending his application for his discharge, whether to defend the suit or allow a final judgment. But the Bankruptcy Act does not permit him to be forced to decide that question now. It declares that no such suit shall be allowed to proceed until he has had a reasonable time to obtain his discharge, if he can, and the mandate of the act to this court is to stay such a proceeding in whatever court it may be pending. My opinion, therefore, is, that it is the clear duty of this court to maintain the injunction heretofore granted against the petitioners until the bankrupt shall have had a reasonable time to obtain his discharge. What effect the discharge, if obtained, will have upon the proceedings pending in the State courts, I do not undertake to decide.

The motion must be denied.

## Southern District of New York.

JANUARY, 1868.

### THE SHIP E. C. SCRANTON.

#### PRACTICE.—REFERENCE.—EXAMINATION OF WITNESS.

The proceedings, on a reference to a commissioner to compute damages, are to be conducted in the usual manner in which they are conducted before a referee or a master in chancery.

Where, on such a reference, the libellant was examined and partially cross-examined, and the libellant's counsel, claiming that the cross-examination had been closed, refused to produce the libellant for further cross-examination, and thereupon the claimants applied to the court for an order staying all proceedings before the commissioner until the libellant was so produced, but it did not appear that the matter had been in any way brought up before the commissioner:

*Held*, That where important questions as to leading principles arise on a reference, it is proper practice for the commissioner to apply to the court for directions, but this is always to be done on his certificate.

That where a commissioner is proceeding irregularly, or refuses to allow necessary testimony to be taken, it is proper to apply to the court, on a certificate from the commissioner as to his proceedings, for relief.

That it is not proper to make such application to the court unless the question is one on which the commissioner has passed one way or another, or has refused to pass.

That as there was here no certificate from the commissioner as to his proceedings, and it appeared that he had not passed upon the matter, the motion would be denied.

BLATCHFORD, J. The 44th Rule of the Instance Rules in Admiralty prescribed by the Supreme Court, provides, that, "in cases where the court shall deem it expedient or necessary for the purposes of justice, the court may refer any matters arising in the progress of the suit, to one or more commissioners to be appointed by

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The Ship E. C. Scranton.

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the court, to hear the parties, and make report thereon ; and such commissioner or commissioners shall have and possess all the powers in the premises which are usually given to or exercised by masters in chancery in references to them, including the power to administer oaths to and examine the parties and witnesses touching the premises." Under this rule the order of reference in this case was made, referring it to a commissioner of this court to ascertain and compute the amount of the damages sustained by the libellant, and report thereon to the court. Under such an order the libellant has a right to put the reference into the hands of any regular commissioner of this court (*Benedict's Admiralty*, section 339). The proceedings before a referee under an order made under the 44th Rule, are to be conducted in the usual manner in which proceedings are conducted before a referee or a master in chancery.

In the present case, the claimants, during the pendency of the reference, and after some progress has been made in it before the commissioner to whom it was given in charge by the libellant, apply to the court, on affidavit, for an order that all proceedings in the action be stayed, until the libellant shall appear before the commissioner and submit to a cross-examination by the counsel for the claimants, or that the direct testimony of the libellant be stricken out. The ground, set forth in the moving affidavit, for this application, is, that the counsel for the libellant has objected to permitting the counsel for the claimants to further cross-examine the libellant, on the ground that his testimony has been closed, and has refused to produce the libellant for such further cross-examination, and has declared that the claimants, if they want him, must subpoena him as their own witness. It does not appear that the matter has been in any way brought before the commissioner, or that he has made any ruling in regard to the same.

It is proper practice, when a reference is pending be-

fore a referee or a master, and important questions as to leading principles arise, for him to apply to the court for directions ; but this is always to be done on his certificate, and the discretion of submitting such matters to the court should be sparingly exercised, because it is the duty of the referee or master to settle, in the first instance, all questions which arise, and to meet every difficulty until he finds he cannot proceed for want of power (*Hoffman's Chancery Practice*, chapter 19, section 7). When, in the course of proceedings before a referee or master, he refuses to allow a question to be put to a witness, as going to matters improper or useless to be inquired into, or for other reasons, the aggrieved party may apply to the court, on a certificate from the referee or master and other papers, for an order that the referee or master allow the question or examine as to the point (*Hoffman's Office of Master*, 34, 35). In *Hallett v. Hallett* (2 *Paige*, 432), on a reference before a master, an application was made to him by the plaintiff for leave to inspect certain books and papers which the defendants had delivered under an order therefor, and to examine the defendants to see if they had delivered everything required by the order. The master refused the application, and the plaintiff, on a certificate of the facts, applied to the court to direct the master to examine the defendants as to the delivery. The court held that the master had erred, and made an order giving leave to the plaintiff to inspect the books and papers and examine the defendants. So, where, on an examination before a master, a party, on the advice of his counsel that a question is improper or irrelevant to the matters referred to the master, and after a decision by the master that it is proper for him to answer the question, refuses to answer it, the matter is to be brought before the court, on an application to compel him to answer, and to punish him for the contempt in refusing to answer, if the question was not an improper one (*Gihon v. Albert*, 7 *Paige*, 278).

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The Ship E. C. Scranton.

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Where a master proceeds irregularly, or where it is necessary to take some testimony which the master erroneously refuses to permit to be taken, the proper course is to make a special application to the court, upon a certificate from the master as to the proceedings, and on due notice to the adverse party, for relief (*Renwick v. Renwick*, 10 *Paige*, 420, 422). So, also, if a master omits to report as to some matters upon which he is directed to report by the order of reference, the remedy is not to except to the report, but to move the court that the report be referred back to the master, with instructions to him to correct the report, so as to make it embrace all the matters of the reference (*Stevenson v. Gregory*, 1 *Barbour's Ch. R.*, 72). It is, therefore, proper to bring before the court, otherwise than by exceptions to a report, matters arising on a reference. But it is not proper to do so unless the question is one which has been passed upon by the referee in one way or another, or one upon which he has directly or practically refused to pass; and, in all cases, there must be a certificate from the referee as to the proceedings. In the present case no such certificate is presented, nor does it appear that the commissioner has refused to allow to the counsel for the claimants the privilege of further cross-examining the libellant, or has refused to make an order directing the libellant to appear and be further cross-examined, or to strike out his direct testimony on his failure to comply with such an order. For these reasons the application is refused.

*I. T. Williams*, for the claimants.

*Beebe, Dean & Donohue*, for the libellant.



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In the Matter of George E. White and John E. May, Bankrupts.

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JANUARY, 1868.

**IN THE MATTER OF GEORGE E. WHITE AND  
JOHN E. MAY, BANKRUPTS.**

**SALE OF ASSETS BY ASSIGNEE.**

No order of court is necessary to authorize the assignee to sell unencumbered assets of the bankrupt.

In this case the assignee in bankruptcy applied to the court for an order directing him to sell certain unencumbered assets of the bankrupts which had come into his hands.

BLATCHFORD, J. No order is necessary. By section fifteen of the Bankruptcy Act the assignee is required to sell all unencumbered estate, real and personal, which comes to his hands, on such terms as he thinks most for the interest of the creditors. General Order No. 21 regulates the sale.

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JANUARY, 1868.

**IN THE MATTER OF WILLIAM H. HUGHES, A  
BANKRUPT.**

**REGISTER'S CERTIFICATE.—ASSIGNEE'S RETURN.—EXPENSES OF  
BANKRUPT'S EXAMINATION.**

If a creditor opposes a bankrupt's discharge, the register must make a certificate of his proceedings, and return the papers into court.

An assignee must make his return, Form No. 35, when requested by the bankrupt, when he has not received or paid any money for the estate, even though he has reason to expect that he shall thereafter receive money on that account.

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*In the Matter of William H. Hughes, a Bankrupt.*

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Where an assignee examines a bankrupt, under the twenty-sixth section of the Bankruptcy Act, the assignee must pay the register's fees, whether he has assets of the bankrupt or not.

If the examination is for the benefit of creditors, the expenses of it must be advanced or secured, under the twenty-eighth section of the Act, by the creditors.

If the examination is one of the steps preliminary to the bankrupt's discharge the expenses must be advanced or secured by the bankrupt.

These expenses do not include any compensation to the assignee. Provision may be made for securing such compensation to him.

BLATCHFORD, J. In answer to the three questions certified in this case, the court replies: 1st. Where, on the return of an order to show cause before a register why a bankrupt should not be discharged, a creditor appears and opposes the discharge, the register must make a certificate of his proceedings, stating the opposition, and return the papers into court in like manner as if there were no opposition.

2d. An assignee must make his return, when requested by the bankrupt, under Form No. 35, when he has in fact not received or paid any moneys on account of the estate, even though he may have reason to believe that he will thereafter receive moneys on account of the estate, as the proceeds of assets thereof.

3d. Under the provisions of section four of the Act, and of General Order No. 29, where an assignee examines a bankrupt before a register, under section twenty-six of the Act, the assignee must pay the fees of the register for such examination, whether he has any assets of the estate or not. If there are assets, the court can, under General Order No. 29, reimburse the assignee out of the assets. The bankrupt is not, under such circumstances, bound to pay the fees of the register. By the provisions of section twenty-eight, the assignee, if not in funds from the estate at any time, to a sufficient extent to defray the necessary expenses which will be required for the further execution of his trust, may require that the funds for that purpose shall be advanced or satisfactorily secured to him before he proceeds further. These funds

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In the Matter of William H. Hughes, a Bankrupt.

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must be advanced or secured by the party for whose benefit the expenses are to be incurred. If they are to be incurred in an examination of the bankrupt, under section twenty-six, with a view to discover assets for the benefit of his creditors, they must be advanced or secured by the creditors. If they are to be incurred in a proceeding by the assignee which is a part of the proper steps preliminary to the discharge of the bankrupt, they must be advanced or secured by the bankrupt. The "expenses," thus provided for by section twenty-eight, do not cover any allowance to the assignee for his services. Section twenty-eight does not provide for any allowance for such services, except by way of a percentage upon moneys received and paid out by the assignee as assets of the estate. But, by section seventeen, the assignee is to be allowed a reasonable compensation for his services, in the discretion of the court; and, if there is any money in his hands, this compensation and all the necessary disbursements made by him in the discharge of his duty, may be retained by him out of such money. This allowance cannot be made until after the services are rendered, because, until the court is advised what the services have been, it cannot determine whether any particular amount of compensation for the services is or is not reasonable, unless perhaps it might, for specific acts, mainly of routine, prescribe specific fees. If there is no money in the hands of the assignee, the payment of the compensation referred to in section seventeen, if it is a compensation for services in steps properly preliminary to the discharge of the bankrupt, can, when the compensation has been allowed, be secured by a withholding by the court of the discharge of the bankrupt, until he makes the payment, on the ground that until then he has not in all things conformed to his duty under the Act; and, if it is a compensation for services for which the bankrupt ought not to pay, its payment to the assignee can probably be secured by appropriate

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The Steamship Manhattan.

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means. Compensation to the assignee for his services in an examination of the bankrupt, under section twenty-six, with a view to discover assets for the benefit of his creditors, is not to be paid by the bankrupt.

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JANUARY, 1868.

THE STEAMSHIP MANHATTAN.

PASSENGER ACT.—STEAMSHIPS.

The provisions of the second section of the Passenger Act of March 3d, 1855 (10 *U. S. Stat. at Large*, 715), do not apply to steamships.

BLATCHFORD, J. This is a libel filed by the United States against the steamship Manhattan, a foreign vessel, owned in Great Britain, founded on the Act passed March 3d, 1855, entitled "An Act to regulate the carriage of passengers in steamships and other vessels" (10 *U. S. Stat. at Large*, 715). The libel alleges, in substance, that the steamship heretofore took on board, at Liverpool, in England, sundry passengers, with the intent to bring them to the United States, and left Liverpool, and brought such passengers to the port of New York, and within the jurisdiction of the United States. It then charges that the vessel, on such voyage, did not have the berths for her passengers constructed, arranged, and occupied as required by the second section of the Act, and avers violations of various provisions of that section, and claims that thereby the master of the vessel forfeited five dollars for each passenger on board on the voyage, and the owners of the vessel also forfeited five dollars for each passenger on board on the

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*The Steamship Manhattan.*

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voyage, and that an action has accrued to the United States to recover such penalties, and that a lien on the vessel exists for the amount of them.

The first section of the Act provides, that no master of any vessel, owned in whole or in part by a citizen of the United States, or by a citizen of any foreign country, shall take on board such vessel, at any foreign port other than foreign contiguous territory to the United States, a greater number of passengers than in the proportion of certain specified numbers to the tonnage of the vessel; that the "spaces appropriated for the use of such passengers, and which shall not be occupied by stores or other goods not the personal baggage of such passengers," shall be in certain specified proportions, namely, so many passengers to so many clear superficial feet of deck; that, if it is necessary, for safety or convenience, to store any articles "in any of the decks, cabins, or other places appropriated to the use of passengers," such places of storage shall not "be deemed to be a part of the space allowable for the use of passengers, but the same shall be deducted therefrom;" and that one hundred superficial feet of deck for a hospital "may be included in the space allowable for passengers."

The second section provides, that "no such vessel" shall have more than two tiers of berths, and prescribes what interval there shall be between the lowest part thereof and the deck, and that the berths shall be well constructed, parallel with the sides of the vessel, and be separated from each other in a certain manner, and be of such length and such width, and be occupied each by no more than one passenger, with a provision for larger berths, and for their occupation, under certain circumstances. The section then provides, that, if there shall be any violation of it in any of its provisions, the master of the vessel and the owners thereof shall severally forfeit and pay the sum of five dollars for each passen-

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The Steamship *Manhattan*.

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ger on board of said vessel on such voyage, to be recovered by the United States in any port where such vessel may arrive.

The fifteenth section of the Act provides, that "the amount of the several penalties imposed by the foregoing provisions regulating the carriage of passengers in merchant vessels, shall be liens on the vessel or vessels violating those provisions, and such vessel or vessels shall be libelled therefor in any circuit or district court of the United States where such vessel or vessels shall arrive."

Relying on the provisions thus found in the first, second, and fifteenth sections of the Act, the United States have filed this libel. The libel does not allege any violation of the first section of the Act, or any overcrowding of passengers, or any carrying of a disproportionate and unlawful number of passengers, or any improper occupation of the space required to be appropriated to the use of passengers, but alleges only violations of provisions of the second section of the Act.

The claimants have filed eleven exceptions to the libel, only one of which, the third, is important to be considered, in the view I take of the statute. The other exceptions involve important questions relating to the admiralty jurisdiction of the court in the suit, and to the power of Congress to impose on a foreign vessel a lien for the penalties prescribed by the second section of the Act, and to other matters, some of substance and some of form. The third exception sets up that the requirements of the second section of the Act do not apply to steamships, and that, therefore, the *Manhattan* is not liable for the penalties claimed in the libel.

The first, second, and fifteenth sections of the Act employ only the word "vessel," without limiting the description of vessel to a merchant vessel, or a sailing vessel, or a steam vessel. The provisions of those sec-

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The Steamship Manhattan.

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tions would, therefore, be broad enough, were there nothing else in the Act, to include a steam vessel, under the words "any vessel," for, a steam vessel is none the less a vessel, in respect to her being water-borne, because she is propelled in whole or in part by steam. But the tenth section of the Act provides as follows: "The provisions, requisitions, penalties, and liens of this Act relating to the space in vessels appropriated to the use of passengers, are hereby extended and made applicable to all spaces appropriated to the use of steerage passengers in vessels propelled in whole or in part by steam, and navigating from, to, and between the ports, and in manner as in this Act named, and to such vessels and to the masters thereof; and so much of the Act entitled 'An Act to amend an Act entitled "An Act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam, and for other purposes," approved August thirtieth, eighteen hundred and fifty-two,' as conflicts with this Act, is hereby repealed; and the space appropriated to the use of steerage passengers, in vessels so as above propelled and navigated, is hereby made subject to the supervision and inspection of the collector of the customs at any port of the United States at which any such vessel shall arrive, and the same shall be examined and reported in the same manner and by the same officers by the next preceding section directed to examine and report." The "next preceding section," the ninth, provides as follows: "The collector of customs at any port of the United States at which any vessel so employed shall arrive, shall appoint and direct one or more of the inspectors of the customs for such port to examine such vessel, and report in writing to such collector whether the requirements of law have been complied with in respect to such vessel; and if such report shall state such compliance, and shall be approved by such

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The Steamship Manhattan.

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collector, it shall be deemed and held as *prima facie* evidence thereof."

If the provisions of the first section, relating to the space appropriated to the use of passengers, apply to steam vessels, under the designation, in the first section, of "any vessel," then the provision of the tenth section, extending such provisions, with the penalties and liens arising therefrom, "to all spaces appropriated to the use of steerage passengers in vessels propelled in whole or in part by steam," is useless and of no effect. So, also, if the provision of the ninth section relating to the inspection of "any vessel," with a view to see "whether the requirements of law have been complied with in respect to such vessel," applies to the inspection of steam vessels, then the provision of the tenth section, subjecting "the space appropriated to the use of steerage passengers" in steam vessels to like inspection, is utterly nugatory. All the affirmative and substantial provisions of the tenth section must be held to be meaningless, if the first and ninth sections are held to apply to steam vessels. And, if the first section does not apply to steam vessels, the second does not, for, the only designation, in the second section, of any vessel to which its provisions are to apply, is by the description, "such vessel,"—that is, such a vessel, and such a vessel only, as the first section applies to and designates.

But there is something more. The first section relates solely to the space appropriated to the use of passengers. The tenth section *extends* the provisions, requisitions, and penalties found in the first section, and the liens which arise therefrom by virtue of the fifteenth section, and makes them applicable to something to which, by virtue merely of the first and fifteenth sections, and but for the tenth section, they would not extend and be applicable. This must be the meaning of the tenth section, or there is no force in language. If those provisions, requisitions, penalties, and liens extend



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The Steamship Manhattan.

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and apply without the tenth section, just as far and as widely as they do with and by means of the tenth section, then the tenth section may be obliterated from the Act. But the proper rule of construction in regard to statutes is, that they must be so construed as to give force and effect and meaning and consistency to all their provisions. By construing the first and ninth sections as not applying to steam vessels, the tenth section has a meaning and operation in all its parts. It extends and applies the first and fifteenth sections, so far as they relate to the space in vessels appropriated to the use of passengers, "to all spaces appropriated to the use of steerage passengers in vessels propelled in whole or in part by steam, and navigating from, to, and between the ports, and in manner as in this Act named, and to such vessels and to the masters thereof;" and it extends and applies the inspection provided for by the ninth section to the space appropriated to the use of steerage passengers in the steam vessels named in the tenth section. But the tenth section is very limited in its provisions. It extends to steam vessels only those provisions of the Act which relate to the space "appropriated to the use of passengers." Those provisions are found in the first section, and nowhere else. The first section contains in various places the words, "the spaces appropriated for the use of such passengers,"—"the space aforesaid,"—"places appropriated to the use of passengers,"—"space allowable for the use of passengers,"—"spaces appropriated to passengers,"—"space allowable for passengers." Similar expressions are not found in any other section of the Act except the tenth; and the first section is wholly taken up with prescribing the superficial deck space to be appropriated to each passenger of the number which, by its tonnage, the vessel is authorized by the first section to carry. Again, these provisions of the first section in regard to such space are, by the tenth section, extended and made

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The Steamship Manhattan.

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applicable only to the spaces appropriated to the use of *steerage* passengers in steam vessels. The tenth section draws a clear distinction between the vessels referred to in the first section, navigating between the ports named in the first section, and steam vessels navigating between the same ports, and indicates, in a manner not to be mistaken, that, as the vessels over which, in certain respects, the tenth section causes the provisions of the first section to be extended, are steam vessels, the vessels to which the first section applies *proprio vigore* do not include steam vessels. Nor do the vessels to which the second section applies include steam vessels; and the tenth section does not extend the second section to steam vessels. In no proper sense can the provisions of the second section be said to relate to the space appropriated to the use of passengers. That "space" means the superficies of clear and unobstructed deck-room to which each passenger is entitled by the first section. The second section relates wholly to the arrangement of the sleeping accommodations.

It was urged, on the part of the Government, that the fact that the tenth section repeals so much of the Act of August 30th, 1852 (10 *U. S. Stat. at Large*, 61), as conflicts with the Act of 1855, taken in connection with the fact that certain provisions of the Act of 1852 related substantially to the space appropriated to the use of passengers in vessels propelled in whole or in part by steam, and were materially different from those found in the Act of 1855, shows that the Act of 1855, while substituting, by the tenth section, the provisions of the Act of 1855, relating to such space, for those of the Act of 1852, so far as concerns steamships, was not intended to exempt steamships from the other provisions of the Act of 1855. There would be force in this argument if there were found in the tenth section only an isolated clause repealing so much of the Act of 1852 as conflicts with the Act of 1855. Then the argument would be a

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The Steamship Manhattan.

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good one, that the word "vessel," in the first and second sections, includes steamships, because otherwise there could be nothing in the Act of 1852, which relates exclusively to steamships, in conflict with anything in the Act of 1855. But this argument fails in view of the other clauses found in the tenth section. That section alone, in the Act of 1855, relates to steamships, and as there might be something in the provisions which the tenth section applies to the spaces appropriated to the use of steerage passengers in steam vessels, which would conflict with provisions in the Act of 1852, it was proper to repeal the earlier conflicting provisions.

It is well known that the mischiefs which Congress was endeavoring to correct when this law was enacted, were those which had arisen in sailing vessels. But, whether this were so or not, Congress has, by the statute, drawn a plain distinction in respect to steamships, and has made only certain specified and limited provisions, not including those of the second section, applicable to steamships.

This libel cannot be sustained without obliterating the tenth section from the Act. I therefore allow the third exception, and dismiss the libel, without passing on any of the other exceptions in the case.\*

*T. Simons (Assistant U. S. Attorney), for the libellants.*

*T. C. T. Buckley, S. P. Nash, and J. Larocque, for the claimants.*

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\* This decision was affirmed by the Circuit Court, in October, 1868.

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In the Matter of Henry Lewis, a Bankrupt.

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JANUARY, 1868.

## IN THE MATTER OF HENRY LEWIS, A BANKRUPT.

## PARTNERSHIP.—PETITION IN BANKRUPTCY BY ONE PARTNER.—RATIFICATION.

Where one member of a firm alone filed his petition in bankruptcy, individually and as a member of the firm, and the register adjudged him a bankrupt individually and as a member of the firm, and also adjudged the firm a bankrupt:

*Held*, That this latter action of the register was erroneous. In such a case, notice of the filing of the petition must be given to those members of the firm who have not joined in it, or assented to it, as if the proceedings were involuntary against the firm.

Where afterwards the other member of the firm presented a petition praying that both of them might be adjudged bankrupts, and that he might have leave to join in the first petition:

*Held*, That this petition might be taken as expressing the assent of the petitioner to the petition of the other partner, and to validate the adjudication of bankruptcy against the firm;

That it was not necessary for him to otherwise join in the first petition. The proceedings as to his individual creditors would be had under his petition, and the proceedings as to the individual creditors of the other partner, and as to the creditors of the firm, would take place under the first petition.

BLATCHFORD, J. In this case, the register, on the 18th of November, 1867 (on a petition filed by Henry Lewis individually, and as a copartner of the firm of P. & H. Lewis, on the 13th of November, 1867), adjudged Henry Lewis individually and as a copartner of the firm of P. & H. Lewis, and also the said firm of P. & H. Lewis, bankrupt. The petition was not joined in by Philip Lewis, who with Henry Lewis composed the firm, nor did Philip Lewis assent to having the firm declared bankrupt. This action of the register was erroneous. General Order No. 18 prescribes the proper practice in such a case. Where a petition is filed to have a firm declared

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In the Matter of Henry Lewis, a Bankrupt.

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bankrupt, if all the members of the firm do not join in, or assent to the petition, notice of its filing must be given to such of the members as do not join in it or assent to it, in like manner as if the proceeding were one in involuntary bankruptcy against the members of the firm. Until this is done the register has no authority to make an adjudication in regard to the bankruptcy of the firm. Philip Lewis now presents to the court a voluntary petition, under the Bankruptcy Act, which prays that he and Henry Lewis may be adjudged bankrupts, and be discharged from their debts. The petition sets forth the copartnership, and the fact of the filing of a petition in bankruptcy by Henry Lewis, and is, in other respects, in form, a copartnership petition according to Form No. 2. The petition refers to schedules annexed to it as being schedules of the debts and assets of the copartnership, and of the debts and assets of Philip Lewis individually. Philip Lewis asks, on filing this petition, for an order that he have leave to join in the proceedings so heretofore taken by Henry Lewis, and his petition states that he is desirous of uniting in the petition of Henry Lewis, and of being made a party to the proceedings thereunder. So far as this petition of Philip Lewis expresses his assent to have the firm declared bankrupt, and his desire to join in the petition of Henry Lewis, Philip Lewis may properly be regarded as joining in the petition of Henry Lewis to have the firm declared bankrupt, so as to effect a compliance with General Order No. 18, and thus validate the adjudication of bankruptcy in respect to the firm. But it is not in any other respect necessary for Philip Lewis to join in the proceedings taken by Henry Lewis, or to be made a party to them. The proceedings in respect to the creditors of the firm, and the creditors of Henry Lewis individually, will take place under the petition of Henry Lewis. The proceedings in regard to the creditors of Philip Lewis individually will take place under his petition. Philip Lewis will be ad-

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The Ferryboat Baltic.

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judged a bankrupt, and receive a discharge under his own petition. Henry Lewis will receive a discharge under his own petition. So far as the petition of Philip Lewis is a petition for an adjudication of the bankruptcy of the firm, it may be disregarded, except as indicating the assent of Philip Lewis to join in the petition of Henry Lewis for an adjudication of the bankruptcy of the firm. Under such circumstances, General Order No. 16 will not apply to the case, as there will be but one petition for an adjudication of the bankruptcy of the firm. The petition of Philip Lewis will be referred to the same register who has charge of the case of Henry Lewis.

*Benedict & Boardman*, for the petitioner.

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JANUARY, 1868.

## THE FERRYBOAT BALTIC.

## COLLISION AT PIER.—BACKING.—LOOKOUT.

Where a steam vessel attempted to make a landing at a pier next to a ferry slip, and backed out, after having gone in bow on, and the wind and tide swept her stern towards the ferry slip, and she continued backing until she came in collision with a ferryboat, which was coming into the slip and had slowed as soon as she saw the other steamboat backing, and had stopped and backed as soon as she had reasonable ground for apprehending a collision:

*Held*, That the ferryboat was free from fault;

That the other steamboat was in fault in backing as she did, having no person on her after deck to look toward the direction in which she was backing.

BLATCHFORD, J. This is a libel filed by the United States, as the owners of the steamboat *Flora*, against the steam ferryboat *Baltic*, to recover for damages caused by a collision which took place between the two vessels,

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The Ferryboat Baltic.

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on the 19th of December, 1863, about half-past one o'clock in the afternoon, in the harbor of New York, about 300 yards distant from the Barge office dock, at the foot of Whitehall street. The Flora was attempting to make a landing at the westerly side of pier No. 1, East River, being the pier at the extreme east end of the Battery. The tide was strong flood, running from west to east, and the wind was blowing strong from the westward. From some cause, either because she missed her landing, and was in danger of being carried against the end of pier No. 1, by the force of the wind and tide, or because she desired to make room for another vessel which was at pier No. 1 to get out, the Flora backed out, after having gone in bow on and got her stem within the end of the pier. The wind and tide swept her stern to the eastward, and she kept her stern way on, with her engine in motion working backward, until she came in collision with the Baltic, which was on her regular trip from Brooklyn to her slip at the foot of Whitehall street, New York. The Baltic did everything she was bound to do, by slowing to half speed, and then stopping, and then backing, to avoid the collision. That she did not do more, as, for instance, that, instead of stopping at once, the moment she saw the Flora backing, at a distance off which then was perhaps half a mile, she slowed to half speed, was no fault on her part. She could have had no reason to suppose, and was not bound to suppose, that the Flora would keep on backing so as to make a collision probable. She slowed to half speed the moment she saw the movement of the Flora, and she stopped and backed as soon as she had any reasonable ground for apprehending that a collision was imminent. There was nothing in view from the Baltic as a cause for the backing of the Flora, and nothing to indicate that there was or would be a necessity for the Flora to back to the extent she did. But, with the wind and tide such as they were, the slowing of the Baltic was a proper precaution.

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In the Matter of John Graves, a Bankrupt.

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There having been no fault on the part of the Baltic, a decree dismissing the libel must, of course, be entered. But in addition to this, the evidence shows reckless carelessness on the part of the Flora. She appears to have blindly backed out into the harbor, with no person on her after deck to look towards the direction in which she was backing, and give signals from that part of the vessel, and no person on the lookout anywhere, and no person anywhere on her deck, except one man in her pilot house, whose attention was directed towards objects at the westward in the Hudson River. No reason is shown for her backing as far as she did. All the damage she suffered by the collision was the consequence of her own careless navigation. A decree will be entered dismissing the libel.

*Ethan Allen* (Assistant U. St. Attorney), for the libellants.

*B. D. Silliman*, for the claimants.

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JANUARY, 1868.

IN THE MATTER OF JOHN GRAVES, A  
BANKRUPT.

ASSIGNEE.—SALE OF PROPERTY.—POWER OF REGISTER.

Applications by assignees in bankruptcy to settle controversies under the seventeenth section of the Bankruptcy Act, or to sell property under the twenty-fifth section, must be made to the court, and not to a register.

In this case, the register certified to the court the question whether assignees must apply to the court for authority, if they wished to take action under the seventeenth and twenty-fifth sections of the Bankruptcy Act.



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A quantity of Distilled Spirits, &c.

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BLATCHFORD, J. If an assignee desires to settle a controversy under section seventeen, or to have property sold as perishable, or because the title to it is in dispute, under section twenty-five, he must apply to the court by petition, and not to a register. If, on the presentation of the petition on notice to any party interested, it shall appear that the matter is uncontested, the court can, under section four, refer it to the register, with power to dispose of it.

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JANUARY, 1868.

A QUANTITY OF DISTILLED SPIRITS, &c.,  
FOUND AT No. 415 EAST FORTY-FIFTH  
STREET.

INTERNAL REVENUE.—BONDING DISTILLERY PROPERTY.—FRAUD.

Where distillery property is libelled for alleged violation of the Internal Revenue Laws, the rule of the court is not to allow it to be bonded where there is reasonable ground, on the evidence, to believe that the law has been violated.

Where it appeared, plainly, that a rectifying establishment and a distillery were situated close together, and that appliances existed by means of which spirits could easily be run into the rectifying establishment from the distillery in fraud of the law, and there was some evidence that that had been done, the motion to bond was denied, notwithstanding the positive affidavits of the claimant and his foreman and his workmen, that it had not been done.

On such an application, the Government is not bound to furnish the details of its evidence, any further than is necessary to show reasonable and probable ground to sustain the prosecution.

BLATCHFORD, J. This is an application to bond a distillery and other property, seized at 415 East Forty-fifth street, and libelled for a violation of the Internal Revenue Laws. The question of bonding distillery property worth more than \$1,000, is expressly confided by the statute to the discretion of the courts. The rule which I have always adhered to, has been not to bond in

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A quantity of Distilled Spirits, &c.

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a case where I have reasonable ground to believe, from the evidence placed before me, that the law has been violated. In the present case, the property is valuable, and the distillery extensive. The capacity to defraud the revenue is large, if the means and the will exist. This is the second application which has been made to me to bond this property, a former application having been denied. I permitted a renewal of it, which is made on new affidavits; and further affidavits are produced on the part of the Government. The application has been urged with great pertinacity, and I have carefully examined the voluminous papers, with a view to see whether a case of probable guilt was made out.

I find, in this case, what experience has shown to be a very common occurrence in the business of distilling spirits—the close proximity of a rectifying establishment to the distillery, and a communication between the two by an underground pipe, ostensibly laid for the passage of Croton water—the two establishments often getting their supplies of water from a common main or source, and through a pipe common to both, to some extent. Under these circumstances, it requires but little ingenuity for men who wish to break the law and defraud the Government, to arrange temporary and shifting means of drawing spirits illicitly from the receiving cisterns in the distillery, and conveying them into tubs in the rectifying establishment.

In the present case, the rectifying establishment was but a few feet distant from the distillery. In a stable on the distillery premises, there was found a hose, about forty feet long, and one inch and a half in diameter, which, about one hour after the seizure, smelt and tasted strongly of spirits. On the outside of the distillery a permanent faucet was found at the end of a one and a half inch lead pipe, which pipe passed underground into the rectifying house. On trying the hose with the faucet, it was found that a butt suitable to the size of the

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A quantity of Distilled Spirits, &c.

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hose would screw upon the mouth of the faucet, and the hose, when so attached to the faucet, was long enough to pass up and into a window near to and above the cistern room of the distillery. This hose was of a length wholly unnecessary for any of the ordinary purposes of filling barrels from the receiving cisterns, or otherwise conducting spirits in a distillery, and it was a spirit-hose, and not a water-hose. The faucet referred to smelt and tasted of spirits. The lead pipe referred to connected with a faucet in the rectifying house, and the latter faucet smelt and tasted of spirits. There was found a stop-cock arrangement, whereby the lead pipe referred to could be permitted to convey water, or be prevented from conveying water, at pleasure. When in the latter condition, it could convey spirits if they were furnished to it. The covers of the receiving cisterns in the distillery were four or five inches apart. Now, with these appliances and facilities for fraud, with the hose, and the butt, and the lead pipe in position, a syphon would easily draw spirits from the receiving cisterns into the hose, and pass them into the rectifying house.

The foregoing facts are clearly established. Yet the court is asked to overlook them, because no witness is produced on this motion, made on affidavits, who actually saw spirits run off in this illicit way, and is asked to credit the sworn denial of the proprietor of the distillery and his foreman and sundry workmen, in *ex parte* affidavits, that no spirits were run off in an illicit way. I cannot do so, but must regard the parties as presumptively guilty of having committed frauds which they seem so industriously to have put themselves in the way of being able to commit by proper appliances. Nor can I assume that, on this application, the Government has brought forward, in reply to the motion, all the evidence it can furnish, when the case comes to a trial, to sustain a forfeiture. Applications to bond in these cases, are, as my experience shows, in many instances, made, not really with an ex-

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A quantity of Distilled Spirits, &c.

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pectation that the application will be granted, but with a view to compel the Government to disclose the names of its witnesses and the details of its evidence. This it is not bound to do to any greater extent than is necessary to show probable and reasonable ground to sustain the seizure and prosecution.

It was strongly urged by the counsel for the claimant, that, if a condemnation was had in this case, the Government would be obliged, on execution, to sell the distillery at public auction, and then the claimant could purchase it, and resume business; and that, therefore, there was no force in any suggestion that the property ought not to be put back now into the claimant's hands, lest he might repeat any frauds he had committed. This argument ought equally to avail against any prosecutions whatever for forfeitures of distilleries for frauds. The law forbids the bonding of distilleries not exceeding \$1,000 in value, and requires that, on condemnation, they shall be destroyed. It authorizes the court, in its discretion, to bond distilleries of greater value than \$1,000, and requires them to be sold on condemnation. But whether, when condemned, a distillery is to be destroyed or to be sold, it is none the less the duty of the public authorities to prosecute it, and of a court and a jury to condemn it, if it has incurred condemnation. So, also, it is none the less the duty of the court, in the exercise of the discretion confided to it in regard to bonding a distillery, to withhold from parties who have once deliberately provided themselves with the means of committing frauds, the opportunity of carrying out their manifest intentions, although the law may require that the property shall, on its final condemnation, be sold at public auction.

If this motion should be granted, the door might as well be thrown open wide and freely to all proprietors of distilleries and rectifying establishments, to provide the means for committing frauds, and then come into court and ask, as often as their property is seized, to have it

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The Schooner Caroline and Cornelia.

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restored to them on bond, as a matter of course. Congress has indicated clearly its intention that this shall not be done. The frauds on the revenue in the matter of distilled spirits have assumed gigantic proportions, and the proper enforcement of the laws demands that the public authorities, and the prosecuting officers, and courts and juries, should discharge their several duties in regard to suits and prosecutions concerning distilled spirits, with firmness and consistency.

The motion is denied.

*S. G. Courtney* (*U. S. Attorney*), for the United States.

*A. J. Dittenhoefer*, for the claimant.

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JANUARY, 1868.

THE SCHOONER CAROLINE AND CORNELIA.

PRACTICE.—SECURITY FOR COSTS.—SEAMEN.

Where seamen served a few days on board a vessel in the port of New York, but did not sign shipping articles, and were paid for the time they served and were discharged, and left the vessel without objection, but libelled the vessel to recover damages for the breaking up of a voyage for which, as they alleged, they had been hired, and process was issued in their favor against the vessel without their giving security for costs, and the claimants applied for an order that they file security for costs:

*Held*, That their claim was not a claim for wages, within the meaning of Rule 45 of this court, and that, therefore, they must file security for costs.

This was a motion on behalf of the claimants of the schooner Caroline and Cornelia, that the libellants file security for costs, the process in their favor having issued against the vessel without their having filed such security, on the theory that they were seamen suing an American vessel for their wages.

For libellants, *A. Nash*.

For claimants, *Beebe, Dean & Donohue*.

BLATCHFORD, J. By Rule 44 of this court, no process *in rem* can be issued unless a stipulation for costs in \$250 is first given by the libellant. But, by Rule 45, "seamen suing *in rem* for wages in their own right, and for their own benefit, for services on board American vessels," are not required to give such security in the first instance, although the court may, for adequate cause, on motion, with notice to the libellant, after the arrest of the property, order the usual stipulation to be given in such case, or that the property arrested be discharged.

In the present case the libellants are seamen, and sue *in rem* an American vessel, but the suit is not one for wages, within the meaning of Rule 45. It is a suit for compensation for special damages for the breaking up of a voyage before it began, and for an alleged breach of contract to employ them on a voyage. They never signed shipping articles. They served a few days in the port of New York, on board of the vessel, and were paid in full their wages for those days, and were then discharged, without objection on their part. They did not leave port in the vessel, or enter on any voyage on board of her. The distinction between wages and a claim for compensation for special damages, under circumstances like those in the present case, is well settled (2 *Parsons on Maritime Law*, 573); and Rule 45 confines the exception in favor of seamen to those suing *in rem* for wages for "services on board" an American vessel. Here the seamen were paid in full for all services on board of the vessel, and they sue now for an alleged breach of contract, because they were not allowed to render further services on board.

The motion that the libellants enter into the usual stipulation under Rule 44, is granted.

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The Brig Jacmel Packet and her Cargo.

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JANUARY, 1868.

## THE BRIG JACMEL PACKET AND HER CARGO.

## BOTTOMRY.—BARRATRY OF MASTER.—SALVAGE.—PREMIUM ON GOLD.

A master of a vessel which had sailed from Singapore, bound to Australia, bartrously ran away with the vessel to the port of Aspinwall, in New Grenada. There he had made arrangements to sell the vessel and cargo, when C., the British consul, who was also Lloyd's agent there, discovered the fraud, and, by the aid of the authorities, the prosecution of the fraud was prevented, and the master absconded. The American consul thereupon appointed a new master, S., for the vessel, and directed him to bring her to New York, as the nearest proper port. C. thereupon advanced \$1,616.82 in gold, to pay bills incurred for the vessel, and took a bottomry bond, executed by S., as master, on the vessel and cargo, to secure the payment of these advances, with 40 per cent. premium. The bond also recited, that it had been agreed between S., the new master, and the United States consul and C., that C. was entitled to a reasonable sum for salvage, as a reward for his recovery of the property; and the bond then assigned the vessel and cargo to C. for the fulfillment of the contract. On the arrival of the vessel at New York, this libel was filed by C. to enforce the bond. No one appeared for the vessel, but an answer was put in by Lloyd's agent in New York, intervening for the interest of underwriters on the cargo. The only defence set up was, that S. was not lawfully appointed master, and had no authority to execute the bond.

*Held*, That the advances were made by the libellant on the credit of the vessel and cargo, and the case was, therefore, a proper one for the giving of a bottomry bond;

That S., having been appointed master by the American consul in a foreign port, agreeably to the usage of merchants under the circumstances, had the same authority to execute the bond as if he had been appointed directly by the owner of the vessel;

That the libellant must have a decree, therefore, for his advances and the premium, no objection being taken to the latter as excessive, but without any allowance for premium on gold;

That the libellant's claim to be recompensed for his services in detecting the fraud and recovering the property was a proper one to be allowed under the bond, not however as salvage, but *pro opere et labore*.

BLATCHFORD, J. This is a libel filed on a bottomry bond, executed at the city of Colon, or Aspinwall, in New Grenada, January 7th, 1867, by Thomas C. Saunders, master of the brig Jacmel Packet, on the vessel and her cargo, conditioned for the payment to the libellant, at

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The Brig Jacmel Packet and her Cargo.

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New York, of \$1,616.82, with 40 per cent. premium, the said amount in gold coin having been advanced at Colon by the libellant to the master, to furnish supplies and repairs for the vessel at Colon for a voyage to New York. The bond also sets forth, that the brig was, on the 6th of August, 1866, chartered and freighted, at Singapore, by her late master, John A. Dawes, to a house there, to convey a cargo of pepper and other articles to Melbourne, in Australia; that the cargo, with a slight deficiency, is on board; and that the late master feloniously deviated from his voyage, and brought the vessel and cargo to the port of Colon, and had already made arrangements to defraud the owners of the vessel and cargo by a sale thereof, when, through the instrumentality of the libellant, the papers and documents appertaining thereto were brought to light, and the barratry prevented, and the cargo and vessel secured to their lawful owners. The bond then states, that it is agreed between Captain Saunders, and the United States consul at Colon, and the libellant, that the libellant "is entitled to a reward for the recovery of the property, as a fee, premium, or salvage, which amount, it is mutually agreed, shall, without delay, be paid in the city of New York, in United States gold, out of the proceeds of the said ship and cargo, and to be levied and adjudged by any competent average adjuster." The master then, by the instrument, mortgages and assigns to the libellant the vessel and cargo, for the due fulfillment of the contract.

The answer is put in by Lloyd's agent at New York, intervening for the interest of underwriters in England on the cargo. There is no answer on the part of the vessel. The only affirmative defence set up in the answer for the cargo is, that Captain Saunders was not lawfully appointed master of the vessel, and had no power to execute the bond, and make the vessel and cargo liable.

The libellant was Lloyd's agent at Colon, and also the British consul there at the time of the transactions in



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The Brig Jacmel Packet and her Cargo.

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question. The vessel arrived at Colon, under the American flag, in December, 1866, and Captain Dawes put her papers into the hands of the American consul there. He put the papers into the hands of the libellant for an investigation of the case, and the libellant detected the fraud of Captain Dawes. Thereupon, Captain Dawes abandoned the vessel, and absconded, and the American consul appointed Captain Saunders to be master of the vessel, and directed him to take her to New York, as the nearest proper port. There appears, from the evidence, to have been a necessity for all the repairs and supplies that are covered by the bond. All the averments of fact stated in the bond are supported by the evidence.

The evidence shows, that the libellant himself furnished directly to the vessel a large portion of the supplies, and paid bills for repairs, and advanced money to the seamen for wages, and paid the consul's bill, and paid bills for articles used for repairs, and also paid for supplies purchased at Colon from other parties. It is apparent, from the evidence, that the libellant furnished these supplies, and paid and advanced these moneys, on the credit of the vessel and cargo, and not at all on the personal credit of the master or the owners. The case was, therefore, a proper one for the giving of a bottomry bond. (1 *Parsons on Maritime Law*, 422, book 1, ch. 11, F, page 422, note 5, and cases cited.) And Captain Saunders, having been appointed master by the American consul, in a foreign port, agreeably to the usage of merchants, under the circumstances disclosed in this case, had the same authority to execute the bond as if he had been appointed directly by the owner of the vessel. (The *Zodiac*, 1 *Hagg. Adm. R.*, 320; The *Nueva Loane*, 22 *Eng. Law & Eq. R.*, 623; *Maclachlan on Merchant Shipping*, 153.)

The rate of maritime interest, forty per cent., contracted for in the bond, is very high, but no objection is taken to it in the answer as excessive under the circum-

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The Brig Jacmel Packet and her Cargo.

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stances. The bond is made payable within a reasonable time after the arrival of the vessel at New York, or any other port, and previous to making any delivery of the cargo at any port. She arrived at New York February 2d, 1867. The libel was filed February 9th, 1867, and the monition was returnable and returned February 26th, 1867.

I award a decree to the libellant for the amount of his advances and payments, \$1,616.82, and for forty per cent. premium thereon, as maritime interest, amounting to \$646.73, making a total of \$2,263.55. No premium to make this amount equal to gold, can be allowed, under the rule adopted in this court. This sum of \$2,263.55 will be subject to interest at the rate of 6 per cent. per annum from February 26th, 1867, to the time of entering the decree herein.

In regard to the claim for a reward or compensation to the libellant for his services in discovering the fraud of Captain Dawes, and preserving the vessel and cargo for their lawful owners, the claim is a proper one to be allowed under the bond. It is not allowed in any respect as salvage, but as a remuneration for services, *pro opere et labore*, under the peculiar circumstances of the case. On the facts, the case resembles, in many material points, the case of *The Zodiac* (1 *Hagg. Adm. R.*, 320), and the case of *The Gauntlet* (3 *W. Rob.*, 82); in both of which cases an allowance for kindred services was made on a bottomry bond which covered them. In the present case the libel avers that the vessel and cargo were worth \$20,000. This averment is denied by the answer, and I find nothing in the proofs showing what their value was, or what a proper allowance would be. I am, therefore, without any guide whereby to determine the amount. As the vessel has been sold in another suit on a claim for wages, and there is no balance remaining from her proceeds, if the amount of such remuneration to the libellant is not agreed upon between

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The Propeller Richard Doane.

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the libellant and the claimants of the cargo, there must be a reference to take testimony by which to fix it.\* When the amount is fixed, as it was, by the bond, to be paid out of the proceeds of vessel and cargo, and no time for payment was specified, the amount will be allowed at the date of entering the decree, without any interest upon it. The libellant will be entitled to the costs of the suit.

*R. D. Benedict and J. Solis Ritterband*, for the libellant.

*Martin & Smith*, for the claimants.

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JANUARY, 1868.

## THE PROPELLER RICHARD DOANE.

## COLLISION.—PLEADING.—VESSEL AND OWNER.

A suit to recover damages for a collision cannot properly be brought against a vessel *in rem*, and her owner *in personam*, unless her owner is also master. All the owners of a vessel injured by a collision should be joined as libellants. The case of *Newell v. Norton* (8 *Wallace*, 257) discussed.

This was a libel for a collision. It stated that David N. Woolman, the libellant, was the part owner and master of a certain canal boat, which was injured by a collision with the propeller Richard Doane, through the fault of the propeller. The libel prayed process against the propeller and against John H. Willis, her owner, and asked that the court would decree the payment of damages against Willis and the vessel, and that the vessel might be condemned and sold to pay the same.

To this libel, Willis, as claimant and respondent, excepted, on two grounds : (1.) Because the libel improperly

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\* This amount was fixed, on a reference, at \$858.

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The Propeller Richard Doane.

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joined a suit *in rem* against the vessel, and a suit *in personam* against her owner. (2.) Because it presented, on its face, a nonjoinder of proper parties as libellants.

For libellant, *M. Goepf.*

For claimant, *W. J. Haskett.*

BLATCHFORD, J. The first exception is well taken. The 15th Rule of the Rules of Practice for Courts of Admiralty in instance causes, prescribed by the Supreme Court of the United States, provides, that in all suits for damage by collision, the libellant may proceed against the ship and master, or against the ship alone, or against the master or the owner alone, *in personam*. This rule has always, since its enactment, been construed as excluding any other mode of procedure, in suits for damage by collision, than that specified in and allowed by the rule. The proctor for the libellant seems to have been misled by an expression in the opinion of the Supreme Court, delivered by Mr. Justice Grier, in the case of *Newell v. Norton* (3 *Wallace*, 257, 266). In that case, a libel for collision was filed against a vessel and her master, who was part owner of her, and her other owners, and her pilot. The District Court sustained the libel as against the vessel and her master, and dismissed it as against the other owners and the pilot. The Supreme Court concurred with the District Court in this practice, and decided that it was proper for the District Court, in its discretion, to allow the libellant to elect in what way he would proceed in a case of such misjoinder, and to amend his libel accordingly. After deciding this point, Judge Grier, in the opinion, says: "The objection that a libel *in rem* against a vessel, and *in personam* against the owner, cannot be joined, was properly overruled, as it was in conformity with the 15th Rule in Admiralty, as established by this court." Now, the report

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<sup>1</sup> In the Matter of J. Ogden Smith, a Bankrupt.

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of the case shows that the objection that was overruled by the District Court was not an objection that, in a libel for collision, proceedings against a vessel and her owner, who was not her master, could not be joined. That objection was sustained. The objection that was overruled was an objection that, in a libel for collision, proceedings against a vessel and her master could not be joined. The overruling of the former objection would not have been in conformity with the 15th Rule in Admiralty, but the sustaining of it was in conformity with that rule. The overruling of the latter objection was in conformity with that rule. It is manifest that the language used by Judge Grier was inadvertently used.

The second exception, also, is allowed. All the owners of the damaged canal-boat may, and should, be joined as libellants. (*Benedict's Adm.*, § 380; *Fretz v. Ball*, 12 *How.*, 466, 468; *Stannard v. The John Hart*, in *this court*, before Judge Betts, March, 1861.)

The libel may be amended, on payment of costs, in both of the particulars in which it is excepted to.

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JANUARY, 1868.

## IN THE MATTER OF J. OGDEN SMITH, A BANKRUPT.

CHOICE OF ASSIGNEE.—DUTY OF REGISTER.—CHANGE OF REGISTER.—  
NOTICE OF OBJECTION TO PROOF OF DEBT.

It is incumbent upon registers in no manner to interfere with or influence, directly or indirectly, the choice of an assignee by creditors.

The policy of the Bankruptcy Act is to give to the creditors, in the first instance, a free, deliberate, unbiased choice of the assignee.

Where creditors applied to have the proceedings sent before another register than the one to whom the case had been referred, on the ground that the register had interfered in the choice of an assignee, the court granted the application, without, however, questioning the motives of the register in what he had done,

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In the Matter of J. Ogden Smith, a Bankrupt.

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but because the creditors, who had made affidavits in support of the application, and their attorney, ought not to be compelled by the court, after all that had transpired, to continue the proceedings before the register in question.

Where creditors, who had proved their debts, served on the register a notice protesting against the proof of any claims against the estate by certain other creditors, and requesting to be notified if any such claims were tendered for proof:

*Held*, That they had the right to serve such a notice.

BLATOHFORD, J. This is a case of involuntary bankruptcy, in which an adjudication of bankruptcy was made by the court on the 17th of December, 1867. The order of adjudication referred the case to one of the registers in bankruptcy of the court, by name, to take such proceedings thereon as are required by the Act. On the same day a warrant was issued, which appointed the 15th day of January, 1868, at the office of such register, as the day for the meeting of the creditors of the bankrupt to prove their debts and choose one or more assignees of his estate. An application is now made to the court, on the part of Hallett & Robbins, creditors of the bankrupt, who have proved their debt against his estate, to vacate so much of the order of adjudication as refers the case to the register designated in the order, and to refer it to some other register, without prejudice to proceedings already had in the case. The ground on which this application is based is, that the register has improperly interfered in the matter of the choice of an assignee of the estate of the bankrupt. Uncontradicted testimony shows that, on several occasions, on several different days, from two to five days prior to the day appointed for the first meeting of creditors and for the choice of an assignee, when creditors attended in person at the office of the register for the purpose of making oath before him to their proofs of debt, he presented, or caused to be presented, to them, a printed blank of Form No. 15, with the name of a person inserted in it as assignee of the bankrupt's estate, and requested them, either directly or through a clerk in his office, to sign

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In the Matter of J. Ogden Smith, a Bankrupt.

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such blank form, and vote for such person as assignee. It does not appear that such person was known to or of by any of such creditors, and it does appear that several of them did not know him or know of him. The register's reply to these allegations consists in a vindication of his motives in soliciting votes for the assignee, and in testimony as to the fitness of the person designated, and in attacks upon the character and motives of the attorney for Hallett & Robbins, who are also the petitioning creditors.

Whatever were the motives of the register, and however well fitted for the position the assignee of his choice was, his interference in the matter, in the manner stated, was wholly unwarrantable and improper. The register is a part of the court, his duties are of a judicial character, and his action should, under all circumstances, be free from reproach and above all suspicion of interest or partisanship. The fourth section of the Bankruptcy Act provides, that "no register shall be of counsel or attorney, either in or out of court, in any suit or matter pending in bankruptcy, in either the circuit or district court of his district, nor in an appeal therefrom, nor shall he be executor, administrator, guardian, commissioner, appraiser, divider, or assignee of or upon any estate within the jurisdiction of either of said courts of bankruptcy, nor be interested in the fees or emoluments arising from either of said trusts." This provision indicates the spirit of judicial impartiality which the law expects will be exhibited by every register in the discharge of his important duties. With the choice of an assignee by the creditors he has nothing to do, except to preside at the meeting at which the choice is made. It is not necessary he should approve or confirm the choice; for, although such an approval by the register is appended to Form No. 15, nothing of the kind is required by the statute. The election is subject to the approval of the judge; and, although it is the duty of the register, in

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*In the Matter of J. Ogden Smith, a Bankrupt.*

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transmitting the result of an election to the judge, for his action thereon, to make known any objection which exists to an approval of the choice, yet, beyond this, the register has nothing to do with either the election or appointment of an assignee, unless there is a failure to choose, or a non-acceptance by the person chosen, and then, in certain cases, the register can appoint an assignee. In regard to the choice of an assignee, the policy of the Bankruptcy Act, as clearly shown in its provisions, is, to give to the creditors of a bankrupt the free, deliberate, unbiased choice, in the first instance, of the person who is to take the assets and manage them. This is a feature which did not exist in any former bankruptcy law of the United States, and was adopted from the English system. The importance of this policy has been uniformly recognized by this court, and it has not failed to approve all elections of assignees by creditors, unless something was placed before it to show that the choice was not a proper one. It is especially incumbent upon registers in no manner to interfere with, or influence, either directly or indirectly, the choice of an assignee by creditors. The action of a register should, in all things, be that of strict impartiality, not only in fact but in appearance, and he should not present the semblance of having any interest or bias in favor of or against any particular person as assignee, any more than of being prejudiced for or against the bankrupt, or for or against any creditor, in any proceeding. Any other course will lead, if not to abuses, to the suspicion of them, and will impair the usefulness of the registers and derange the harmonious working of the system.

It might not be proper, in this case, to apply the remedy asked for, of transferring the case to another register, were it not that it is manifest, from the affidavits in the matter, and from what transpired in open court, on the argument of the motion, that it will be a judicious exercise of discretion to send the case to another regis-



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ter. This I do without at all meaning to question the motives of the register in soliciting votes for the assignee designated by him. I do it because the creditors who have made affidavits in support of this motion, and the attorney for the petitioning creditors, ought not to be compelled by the court, after all that has transpired, to continue the proceedings in this case before the register to whom it was referred.

Some animadversion was made by the register upon the fact that the attorney for the petitioning creditors served upon him, on the 10th of January, 1868, a notice stating that such creditors protested against the proof of any claims against the estate by four several creditors, naming them, and opposed their claims on the ground that they were not entitled either to prove their debts or to vote for or be eligible as assignees, and requesting that such attorney might be immediately notified if any of such persons should tender their claims for proof. This notice was served in the exercise of an undoubted right. Section twenty-three of the act provides, that "when a claim is presented for proof before the election of the assignee, and the judge entertains doubts of its validity, or of the right of the creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, he may postpone the proof of the claim until the assignee is chosen." Rule 6 of this court gives to the register the same power of postponing the proof of a claim. The last clause of section twenty-two of the act provides for the mode of investigating a claim, with a view to its rejection if it shall be shown to be founded in fraud, illegality, or mistake. The notice in question served on the register seems to have been a proper notice preliminary to the exhibition to the register of grounds for the exercise of his power of postponement in regard to the claims specified.

For creditors, *Mr. G. D. Lord.*

The register, in person.

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*The Brig Beaver.*

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JANUARY, 1868.

## THE BRIG BEAVER.

## COLLISION OFF QUARANTINE.—VESSEL AT ANCHOR.

Where a vessel at anchor is struck by one in motion, the presumption of law is, that the collision is caused by the negligence of the latter, unless the former is anchored in an improper place.

Where a brig came into New York Harbor from sea, and anchored, in a strong wind and heavy sea, about 400 feet to windward of another vessel which was already at anchor, dropping but one anchor, and was left without a sufficient watch on deck, and, the wind and sea increasing, her chain parted, and she drifted down upon the other vessel, which had paid out all the chain possible, to avoid her as she drifted, and her other anchor was not dropped till after she was afoul of the other vessel:

*Held*, That the brig was in fault in anchoring where she did, under the circumstances, and in not having a proper watch, and in not dropping a second anchor when the wind and sea increased; and that she was liable for the damages.

BLATCHFORD, J. This is a libel for a collision which took place about six o'clock in the morning of the 16th of August, 1867, at the Quarantine ground in the lower Bay, in the harbor of New York, between the brig Julia F. Carney, owned by the libellants, and the brig Beaver. The Julia F. Carney was at anchor, and had arrived from Havana four days previously. The libel alleges, that the Beaver came in from sea during the night before the collision, with a strong southerly and easterly breeze, and anchored too near to the Julia F. Carney, with only one anchor out, her port anchor, and directly to the windward of and ahead of the Julia F. Carney; that, at about six o'clock the next morning, the wind continuing to blow a fresh breeze from the south and east, the Beaver struck adrift, and dragged afoul of the Julia F. Carney, carrying away her bowsprit and all her head gear, and otherwise seriously damaged her; that the Beaver had not at the time a proper lookout and watch; and that the collision would not have occurred if the Beaver had been properly and safely moored a proper

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The Brig Beaver.

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distance from the Julia F. Carney, or had suffered her other anchor to run when she first began to drift, or if her braces had been promptly checked so as to give her the proper sheer.

The answer avers, that the Beaver arrived in port from sea at about one o'clock in the morning, in charge of a duly licensed pilot, who anchored her at the lower Quarantine by a good and sufficient anchor and chain cable, about four hundred feet directly ahead of the Julia F. Carney, in the tide way of the anchorage ground; that, by the force of the wind and sea, the chain cable of the Beaver parted, and she struck adrift; that her crew immediately thereafter let go another anchor with a sufficient chain cable; that, by force of the winds and waves, and not by any negligence, she was driven against the Julia F. Carney; that the collision was the result of an inevitable accident; that, when the Beaver struck adrift, the watch on the Julia F. Carney had notice thereof, and were hailed by the crew of the Beaver to pay out chain, and had time and room enough to do so, but failed to do so; and that the collision was caused by such failure.

As the Julia F. Carney was at anchor, and was run into by the Beaver while the Beaver was in motion, the presumption of law is that the collision was caused by the fault of the Beaver, unless the Julia F. Carney was anchored in an improper place. (1 *Parsons on Maritime Law*, book 1, ch. 7, page 201, and note 8, and cases there cited.) It is not shown that it was improper for the Julia F. Carney to anchor where she did anchor. No such defence is set up in the answer, and there is nothing in the evidence to warrant any suggestion of the kind. It is incumbent, therefore, on the Beaver to establish that the collision was not caused by her fault.

I think that the evidence, instead of establishing a case of inevitable accident or *vis major*, shows that the collision was occasioned by the fault and negligence of

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The Brig Beaver.

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the Beaver. She anchored, in a strong wind and a heavy sea, within four hundred feet, according to the statement in the answer, of the Julia F. Carney, and directly ahead, and to the windward, of her, in the tide way. She had only her port anchor out, and, as the wind and sea increased, she did not put out another anchor. The chain cable of her port anchor parted, and she began to drift. The tide was flood. The parting took place under water near the anchor, and the fact of such parting was not known until the day after the collision. The crew of the Julia F. Carney, seeing the Beaver drifting toward their vessel, paid out all the chain they could to their own anchor, in a prompt manner, but, notwithstanding this, the Beaver came broadside on against the bows of the other vessel, and it was not until after the collision, that the Beaver's starboard anchor was run out. It was negligence in the Beaver to anchor so near to the Julia F. Carney, and not to put out another anchor when the wind and the sea increased. (*The Volcano*, 2 *W. Rob.* 337; *The Massachusetts*, 1 *W. Rob.* 371; *The Northampton*, 1 *Spinks*, 152.) It was also negligence in her not to have got out her second anchor in season to have avoided the collision. This, on the evidence, might have been done by prompt action on her part. The reason why it was not done is shown by the evidence to have been because there was no sufficient watch on the deck of the Beaver, the drifting of the vessel having been discovered by the cook of the Beaver, who was on deck, and announced it to the master. There was no person but the cook on the deck of the Beaver at the time, and there had not been for some time before. The collision might have been avoided by ordinary care and skill and common foresight on the part of those in charge of the Beaver. If there were in the case nothing but the mere parting of the cable, unattended by any contributory negligence, the case might be different.

There must be a decree condemning the Beaver, with

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The Ship Norway.

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a reference to a commissioner to ascertain and report the damages caused to the libellants by the collision.

*W. R. Beebe and A. J. Heath*, for the libellants.

*Stevens & Reymert*, for the claimants.

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JANUARY, 1868.

THE SHIP NORWAY.

PRACTICE.—MARRIED WOMAN AS A COMMISSIONER.

Where an application was made for a commission to examine a witness in the East Indies, it appearing that no one was known who could be named as commissioner, except the wife of the witness, she was named as commissioner.

This was an application on the part of the claimants for a commission to examine a witness. The affidavits showed that the witness was residing near Goa, in the East Indies, and that, after diligent inquiry, the claimants had been unable to find the name of any official or merchant residing there, or any one else whom it would be proper to name as commissioner, except the wife of the witness, who was a lady of intelligence and education, and the motion was made to appoint her as commissioner. After hearing counsel, the court granted the motion.

For libellants, *J. Van Vleck*.

For claimants, *Benedict & Benedict*.

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In the Matter of George S. Mawson, a Bankrupt.

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JANUARY, 1868.

**IN THE MATTER OF JOHN P. SMITH AND JAMES SMITH, INVOLUNTARY BANKRUPTS.****COSTS.—CLERK'S AND MARSHAL'S FEES.**

Where, in a case of involuntary bankruptcy, the petitioner advanced the clerk's fees, including \$50 for the register, and also \$40 for the marshal, as messenger, before he executed the warrant, and, after an assignee was appointed, applied for an order that the assignee repay them those sums out of the estate; the court (BLATCHFORD, J.) held, that the motion could not be granted in that shape; but, that the court could, under section forty-seven of the Act, and General Order No. 29, direct the assignee to pay the register's and marshal's fees out of the estate, but it must be regular bills of legal fees, properly taxed, and not those gross sums.

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JANUARY, 1868.**IN THE MATTER OF GEORGE S. MAWSON, A BANKRUPT.****PRACTICE.—OBJECTING TO DISCHARGE.**

Where an opposing creditor, deeming that it appeared, from the examination of the bankrupt, that he was not entitled to his discharge, desired the opinion of the judge on the point, on a certificate of the register:

*Held*, That the question was not one on which the opinion of the court, under section six of the act, could be taken, at that stage of the case.

In this case, on the examination of the bankrupt by a creditor, he testified to facts tending to show that he had induced another creditor to withdraw his opposition to a discharge, in violation of section twenty-nine of the

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In the Matter of Siegfried Isidor and Jules Blumenthal, Bankrupts.

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Bankruptcy Act. The creditor, thereupon, desired the opinion of the court on the question whether, on those facts, the bankrupt was entitled to his discharge; and the register certified the question to the court.

BLATCHFORD, J. I do not think that the question certified, as to whether the bankrupt is or is not entitled to his discharge, is one on which the opposing creditor is at liberty, at this stage of the case, to take the opinion of the district judge, under section six of the act. The question is not one which has arisen or can arise in the course of the proceedings before the register, for the reason that, by section four of the act, the register is forbidden to hear any question as to the allowance of an order of discharge. Nor is it a question which has arisen upon the result of any proceedings before the register, because no such question can arise, upon the result of any such proceedings, until the opposing creditor has filed, under General Order No. 24, a specification of the grounds of his opposition to a discharge; and, when that is done, the case is then, *ipso facto*, removed from before the register and taken into court, under section thirty-one of the act, and General Order No. 24, and Rule 16 of this court.

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JANUARY, 1868.

IN THE MATTER OF SIEGFRIED ISIDOR AND  
JULES BLUMENTHAL, BANKRUPTS.

EXAMINATION OF BANKRUPTS.—LACHES.

Where the bankrupts were examined by the assignees, and creditors filed specifications of opposition, which the court held irregular in form, and allowed them time to file new ones, and in the interim they applied for an order that the bankrupts attend and be examined under section twenty-six of the act, several months

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*In the Matter of Siegfried Isidor and Jules Blumenthal, Bankrupts.*

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having elapsed since the proofs of the creditors' debt, and no reason for requiring a new examination being shown:

*Held*, That the application must be denied.

BLATCHFORD, J. In this case creditors oppose the discharges of the bankrupts, and filed specifications of opposition before the register, which, with all the papers in the case, have been transmitted to the court by the register. The court has held the specifications to be irregular in form, and has allowed ten days' time to the opposing creditors to file new specifications. The creditors now ask for an order that the bankrupts attend and submit to an examination, under section twenty-six of the act. This application is made on behalf of fourteen creditors, who have filed notices of the entry of appearances in opposition. One of such notices is on behalf of William Brunner & Co., who have not proved their debt. As to the other thirteen, the debts of three of them were proved July 22d, 1867; the debts of eight of them were proved September 6th, 1867; the debt of one of them was proved September 12th, 1867; and the debt of the remaining one of them was proved November 22d, 1867. The day for showing cause against the discharge of the bankrupts was December 28th, 1867. Abundant opportunity was afforded to these creditors to examine the bankrupts on oath, under section twenty-six, but none of them took any steps for that purpose. The bankrupts were examined at considerable length by one of the assignees, on an order for that purpose obtained by the assignees. Those examinations took place from December 16th to December 27th, 1867, and are on file among the papers. Under these circumstances, I do not think it would be reasonable to require the bankrupts now to submit to a new examination under section twenty-six, especially as no reason for doing so is shown by affidavit.



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The Steamboat Cayuga.

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## Eastern District of New York.

JANUARY, 1868.

## THE STEAMBOAT CAYUGA.

## DAMAGES IN COLLISION CASES.—FERRY-BOAT.—DEMURRAGE.—SUPER-INTENDING REPAIRS.

Where a ferry-boat was injured in a collision, and was withdrawn for repairs, her place being supplied by a boat taken off from another ferry belonging to the libellants, whose place was in its turn supplied by a spare boat, but it was not shown that the injured boat could have been chartered for any sum for the time she was so laid up, but proof was given of the value of her use, based on her receipts while running on the ferry:

*Held*, That the use of the ferry-boat was valuable;

That the case of *Williamson v. Barrett* (13 How. 112), holding that the market value of a vessel is the criterion of her value in collision cases, does not apply where it appears that no such thing as a market price exists;

That there being no market price, a judgment as to her value, given by men having experience upon the ferries, founded upon their knowledge of the business, is the natural way to ascertain the loss.

Where the owners of the ferry-boat repaired her themselves, and charged, in addition to the pay of the laborers, an addition of twenty-five cents a day, which was proved to be usually charged for the use of tools and yard, &c., and also made a charge for the services of two men in superintending the repairs:

*Held*, That these items were recoverable as part of the damages.

This was a libel for collision filed by the Hoboken Land Improvement Company, owners of the ferry-boat, to recover damages for a collision between her and the Cayuga. The court held the Cayuga in fault. (See vol. 1, p. 171.) On the reference to ascertain the damages, it appeared that the libellants themselves repaired the boat. Exceptions were taken to the report of the commissioner. The questions raised on the exceptions sufficiently appear in the opinion.

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The Steamboat Cayuga.

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For libellants, *W. J. A. Fuller.*

For claimants, *C. Van Santvoord.*

BENEDICT, J.—This case comes before me upon exceptions to the commissioner's report of the damages caused by the collision in the pleadings mentioned. The main exception is to the allowance by the commissioner of demurrage at the rate of seventy-five dollars per day for the time the injured vessel was undergoing repairs. This exception is based upon the ground, that there is no evidence that the vessel could have been chartered for that or any sum per day, at the time in question. The evidence showed that the vessel was a ferry-boat, at the time of the injury engaged in making the regular trips of the Hoboken ferry; that she was necessarily withdrawn from the ferry during the repairs, and her place there supplied by another ferry-boat belonging to the same company, which was taken off from the Christopher street ferry for that purpose, the place of the latter being in turn supplied by a spare boat.

For the use of vessels of this class there is no such thing as a market price fixed by various transactions between various persons. Ferry-boats are not general ships, up for charter or hire in open market, and it is impossible to refer to any such market to show the value of the use of such a vessel at the time in question. But it is said that the Supreme Court, in *Williamson v. Barrett*, 12 How. 112, have laid down the rule that the only criterion by which this value can be ascertained is a market price. I do not so understand the decision of that court. The rule there laid down can only be intended to be applied in cases where there is such a market to refer to, but not in a case where it is made to appear that no such thing as a market price exists. In the absence of a market price to refer to, some other evidence must be allowable in a case like this, for the

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The Steamboat Cayuga

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use of the injured vessel was clearly valuable. She was, when injured, in constant, permanent employment, engaged in making regular but short voyages, transporting almost the same number of passengers each day, all for a fixed price, and all for cash, and her owners had a monopoly of the route. It would seem, then, that the actual value of her use for seventeen days could be ascertained more nearly than that of most other classes of vessels. Two witnesses of large experience upon the ferries were called to prove this value, and they testify to the amount which the commissioner has reported. This it seems to me is one way, and, when the witnesses are in a position to know the actual result of the employment of a ferry-boat for any given period, not an unsatisfactory way to prove the damages arising from the detention of such a vessel.

In the absence of a market price, the judgment of such persons, founded upon knowledge of the business, is the natural way to ascertain the loss occasioned by such an interruption. It was competent to show the inaccuracy of the estimate by proof of the actual receipts and expenses of a ferry-boat upon such a ferry, or by counter estimate. In the absence of any such opposing evidence, the estimate of the witnesses must be deemed an accurate statement of the value of the use of the vessel in question, and as such was properly allowed. Exception is also taken to the item of \$43.75, which is an addition of twenty-five cents per day made to the wages actually paid the laborers engaged in the repairs, for the use of tools, rent of yards, &c. The item I think properly allowed upon the evidence, as forming part of the actual cost of the repairs. As a profit it could not be allowed, but the evidence shows that the use of tools, yard, &c., when furnished, is by usage estimated at that sum, and compensated for in that way. Another item objected to is a charge for the services of two persons who superintended the repairs. These persons per-

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Lawrence Seaman v. The Erie Railway Company.

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formed the service, and I see no reason for refusing a proper compensation for it, notwithstanding the proof that they were in the employ of libellants upon a salary. The libellants, by reason of the collision, lost the use of the services of these two men for the period they were engaged on the repairs, and should be allowed a proper sum to compensate for such loss. No fair objection is raised upon the evidence to any other items of the report, and it must accordingly be confirmed.

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JANUARY, 1868.

LAWRENCE SEAMAN v. THE ERIE RAILWAY  
COMPANY.

SALVAGE.—ICE.—COMMON CARRIER.—LIABILITY OF OWNERS FOR  
SALVAGE OF CARGO.

Where a railway company received freight in New York, which must be carried to New Jersey to be put on the railroad trains, and had made a contract with one A. to carry such freight from a dock in the East River to the station in Jersey City, A. agreeing to assume the risk of the transportation across the river, and a barge belonging to the company, loaded with such freight, was transporting it across the river, under the direction of A. or his employees, the barge, with another barge, being towed by a steamboat, and the hawser parted, and the one barge was left to drift, while the steamboat took care of the other; and while she was so drifting, a large field of ice came up the river, and carried her along with it in such a direction that the barge was in imminent danger of being crushed between the ice and a pier above, and thereupon a steaming, on the call of those on board the barge, went to her, and pulled her out of the ice, and got her into one of the slips, till the field drifted by, the value of the barge and cargo being from \$30,000 to \$45,000, and of the tug \$10,000, and the service occupying about half an hour:

*Held*, That the service was a salvage service;

That the railway company were personally liable for the salvage;

That \$500 was a reasonable salvage, besides \$50 for injury to a hawser.

BENEDICT, J. This is an action *in personam* to recover salvage compensation for services performed by

the steamtug J. S. Underhill, in this port, in rescuing the barge H. Suydam and her cargo from the ice.

The evidence discloses the following state of facts : On the 23d of January, 1867, the steamtug Van Houghten, while engaged in towing two barges in the East River, parted her hawser, and was compelled to leave one of them, the H. Suydam, adrift, while she towed the other into a pier.

While the Suydam was so adrift, and while the Van Houghten was engaged in landing the other barge at the pier, a large field of ice came into the East River upon the flood tide, which caught the Suydam, and carried her along with it up the river, the barge lying at right angles to the shore, with her stern to the New York side, and her bow imbedded in ice. The river narrows above the South Ferry, and the flood tide sets over to the New York shore, so that the floe as it moved up was constantly approaching the New York piers, and when off Pier 9 was from one hundred to three hundred feet from the piers. It was, moreover, large enough to fill the river in the narrow part above, and so firm that later in the day numbers of persons crossed the river upon it, after it had jammed in at the Fulton Ferry.

The Underhill was lying at Pier 9, and as the barge was carried by her, the master of the Underhill hailed those on board of the barge, and called attention to their danger. No answer was immediately returned, but shortly those on the barge hailed the Underhill to come to their aid. The Underhill at once pushed out, backed down to the barge, threw her a line, pulled her out of the ice, and started with her for the slips. By this time the vessels had been carried up as far as Pier 16, the upper pier of the Wall-street Ferry slip. On reaching the piers, the tug swung the barge into the slip above the ferry, and herself into the ferry slip, the ice being then close upon the vessels, and in fact pushing against

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the tug as she moved into the slip. So placed, with her hawser still fast to the barge, but around the end of Pier 16, the tug held the barge until the ice moved off, when she took her to her destination at Jersey City, no injury having been sustained by either vessel, except the chafing of the hawser by the strain around the pier.

These facts present all the elements of a salvage service. That there was imminent danger of great damage, if not of the total loss of the barge and her cargo, can hardly be doubted. Upon the whole evidence, no other means of rescue was at hand but the Underhill, although there is some testimony going to show that the Van Houghten could have reached the barge, and would have rescued her, had not the Underhill gone out. The Van Houghten, it is true, was coming up the river, in hopes to get hold of the barge, but the evidence shows that the ice was closing on the piers so fast that she herself was compelled to take refuge in the ferry slip, and was already there when the Underhill got in; and if the Van Houghten could have reached the barge under the circumstances, all she could have done was to have passed up the river, and by casting a line to the barge endeavored to tow her up the river ahead of the ice before it should shut in. But a large part of the floe was already above the barge; and upon the evidence, I consider the success of such an attempt, had it been made, as extremely doubtful. So it must have appeared to the men on the barge, for they saw the Van Houghten coming up, and heard the hail of the Underhill as they passed her, but called only when it was apparent that the Van Houghten could not reach them in time. The service rendered was not without risk to the Underhill, for the floe was heavy ice, extending to the Brooklyn shore, and had it caught the tug against a pier, she could not have escaped without serious damage. She had barely time to save herself, without any allowance for accident or misjudgment.

The aid thus furnished was voluntary ; it was rendered promptly, and resulted in success. Such a service the maritime law, out of considerations of public policy, is careful to reward with liberality.

As bearing upon the question of the amount proper to be awarded in this case, it is worthy of remark, and, under the circumstances, of commendation, that the master of the tug, while he watched the barge, and in time called her attention to her danger, did not obtrude his services, but allowed the persons on the barge to decide as to the possibility of being rescued by their own tug ; and when called, although no other aid was present, he made no attempt to make a hard bargain, but, relying upon the maritime law to give him due compensation in case of success, at once assumed the risk.

The value of the tug was about \$10,000 ; the value of the barge and cargo from \$30,000 to \$45,000. The time occupied, however, did not exceed thirty minutes, not including the time used in taking the barge to the railway dock in Jersey City. No loss of business or injury to property was sustained beyond the chafing of the hawser. The ordinary price charged by tugs about the harbor on this day was \$15 per hour. In view of all these circumstances, I deem \$500 a proper reward, to which I add \$50 for the damage to the hawser.

A remaining question in the case is, whether the defendants, the Erie Railway Company, can be held personally liable for this amount, in an action *in personam*. The facts material to the disposal of this question are not in dispute. It appears that the barge belonged to the Erie Railway Company, and was laden with merchandise which had been delivered to that company in New York city, to be transported by them West.

Being common carriers by land, the exception of perils of the seas formed no part of the contract between the railway company and the shippers of the goods.

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The trains of this railway start from the railway dock at Jersey City, but the company have a station for the receipt of freights at the East River, in New York city, and by a general contract made between them and one Archer, the latter for a consideration paid him by the railway company, had agreed to provide suitable conveniences for, and to receive all freight offered at the East River station, for the West *via* the railway, and to deliver such freight at the railway dock in Jersey City, Archer also agreeing to assume all the risk of the transportation across the river. This barge, when she was caught in the ice, was transporting her cargo to Jersey City, under the direction of Archer or his employees, in pursuance of this contract. I see nothing in these facts to relieve the railway company from liability for this salvage. The nineteenth rule of the Supreme Court gives the right to proceed *in personam* for salvage against the party at whose request and for whose benefit the service is performed. That party, in this case, was the Erie Railway Company, for they were the owners of the barge, and held the relation of carriers to the merchandise on board. In case loss or damage had occurred to the merchandise by the ice, the railway company would have been personally liable to the owners of the merchandise, and that liability they escaped through the services of this salvor. Moreover, the libellants had a lien upon the barge and her cargo for this salvage, which they could have enforced, and which, had it been enforced, the defendants would have been compelled to discharge. Having received this property from the hand of the salvor, they thereby became liable to pay the amount of the lien. (The Emblem, *Davies' R.*) The maritime law, while it is careful to secure to salvors their compensation, by giving them a lien upon the property saved, does not compel them in all cases to proceed against the property to secure the benefits of the lien. Such a rule would cause unnecessary expense,



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and in many cases serious embarrassment to commerce, to avoid which the salvor is permitted to surrender the property to its owner, and to the extent of its value hold him personally liable for a proper salvage compensation for the benefit received.

A decree must accordingly be entered in favor of the libellant for the sum of \$550, with costs.

*John F. Baker*, for libellant.

*Eaton, Tailer & Newell*, for respondents.

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## Southern District of New York.

FEBRUARY, 1868.

### IN THE MATTER OF MICHAEL W. FREDENBERG, A BANKRUPT.

#### PARTY.—EXAMINATION OF WITNESS.—COUNSEL.—CERTIFICATE OF REGISTER.

The only parties to bankrupt proceedings are the bankrupt and the creditors.

A witness in bankruptcy proceedings cannot take the opinion of the Judge, on a certificate by a register, or be represented by counsel, except in a proceeding against him for contempt.

Where a witness, called for examination under the twenty-sixth section of the Bankruptcy Act, objected to being examined, on the ground that there was no authority to examine a witness under the Act unless there was a question in controversy to be settled by testimony, and not until after the examination of the bankrupt himself, but, without insisting on the objection, submitted to an examination, and the register certified the question, involved in his objection, to the court:

*Held*, That the objection was frivolous;

That, after the witness had waived his objection, there was no question to be certified, and the register should have refused to give a certificate.

In this case, a witness was called to be examined under section twenty-six of the Act. He objected to

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In the Matter of Michael W. Fredenberg, a Bankrupt.

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being examined, but, without insisting on his objection, submitted to an examination, and the register, on his request, certified the question, raised by his objection, to the court.

BLATCHFORD, J.—In answer to the question certified in this case, I reply :

1. The question is certified on the prayer of the witness, under section six of the Act. The register might properly have refused to certify the question. It is only a party to the proceedings before the register, who can take the opinion of the District Judge on a certificate of the register, on a matter arising in the course of such proceedings, or upon the result of them. The word "party" means the bankrupt or a creditor of his. It does not mean a witness who is not the bankrupt or a creditor of his.

2. I notice, from the certificate of the register, that the witness was represented before the register by counsel. The certificate speaks of the "counsel for witness." This is an anomaly. It can only lead to confusion and delay. It is only parties, the bankrupt or a creditor, who are entitled to be represented by counsel, either before a register or the court, unless where a witness is made a party to a new and collateral proceeding, by being cited to answer for an alleged contempt.

3. The register was correct in his decision, that the witness was properly under examination.

4. The register certifies that the witness, without standing on the objection, submitted himself to examination. Section seven of the Act provides, that, if any person examined before a register refuses or declines to answer, the Judge shall have power to order such person to pay the costs thereby occasioned, if such person be compellable by law to answer, and such person shall also be liable to be punished for contempt. The objection made by the witness in this case was so

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In the Matter of Michael W. Fredenberg, a Bankrupt.

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entirely frivolous, that, if he had not submitted to an examination, the case would have been a clear one for the imposition of costs and for punishment for contempt. The objection made was, that there is no authority to examine a witness in any matter under the Bankruptcy Act, unless there be a question in controversy to be settled by testimony, and not until after the examination of the bankrupt himself. The twenty-sixth section of the Act, under which section the witness in this case was summoned, requires him to submit to an examination on oath upon all matters relating to the disposal or condition of the bankrupt's property, to his trade and dealings with others, and his accounts concerning the same, to all debts due to or claimed from him, and to all other matters concerning his property and estate and the due settlement thereof according to law. In addition to this, the court can compel the giving of testimony by witnesses, in the taking of evidence, under section thirty-eight of the Act. The objection made by the witness was wholly without foundation, and the fact, that he himself was unwilling to stand upon it, showed that he regarded it as untenable.

5. Although the objection was made, yet, by submitting to an examination, which the register states was concluded, the witness waived the objection, and after that there was no point or matter, within the meaning of section six of the Act, to be certified by the register, and he ought on that ground to have refused to certify the question.

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In the Matter of William D. Hill, a Bankrupt.

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FEBRUARY, 1868.

**IN THE MATTER OF WILLIAM D. HILL, A  
BANKRUPT.****SPECIFICATIONS OF OBJECTION TO DISCHARGE.—BURDEN OF PROOF.**

Where specifications of objection to a bankrupt's discharge state that he has placed his property in the hands of his wife, and withheld his books, papers, and documents, they will be held too general, unless they are intended to apply to all his property and all his books, papers, and documents.

A general charge of fraud against the Act is too vague.

After specifications of objection are filed, further proof may be taken, if desired, by a reference to the register.

The issues to be tried in such case are the allegations in the specifications; and, where the bankrupt has taken the oath, required by section twenty-nine of the Act, the burden of proof is on the creditor to show that the bankrupt has forfeited his title to a discharge.

In this case, a creditor filed specifications of his objections to the bankrupt's discharge, which, among other objections, stated:

"That the said bankrupt, with intent to defraud his creditors, has fraudulently placed his property in the hands of his wife, with intent to prevent it from being reached by his creditors, and applied in satisfaction of their debts, and that his said wife so held his property at the time of filing the petition aforesaid.

"That he has withheld his books, papers, and documents relating to his business.

"That he has been guilty of fraud, contrary to the true intent and meaning of the Bankruptcy Act."

BLATCHFORD, J.—In this case I have examined the written specifications filed on behalf of William S. Preston, a creditor, of the grounds of his opposition to the discharge of the bankrupt. All of them are in proper

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In the Matter of William D. Hill, a Bankrupt.

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form to be triable, except those hereinafter mentioned. The one in regard to placing the bankrupt's property in the hands of his wife is too vague and general, unless it means that the bankrupt placed all his property in the hands of his wife. Otherwise, the specification should state what property. The specification in regard to the withholding of his books, papers, and documents is too vague and general, unless it is intended to cover all his books, papers, and documents. Otherwise, it should specify which of them. The general charge of fraud against the Act is too vague. It should specify the particular fraud. As I understand the specifications, they state that the evidence already taken before the register shows that the bankrupt has placed his property in the hands of his wife, and has withheld his books, papers, and documents, and has been guilty generally of fraud against the Act. I shall allow the creditor, if he desires, to amend, within ten days, his specifications, in the particulars so held not to be triable. If either party shall desire to take further testimony as to the matters embraced in the specifications, it must be referred, under section thirty-eight of the Act, to the register, to take such testimony and report it to the court; and, when his report comes in, either party can bring the case on for hearing on any Saturday, on four days' notice to the other party and to the clerk. The issues to be tried and decided will be the allegations in the specifications, and, as the bankrupt has taken and subscribed the oath, required by section twenty-nine of the Act, the burden will be upon the creditor to show that the bankrupt has forfeited his title to a discharge, by having done some one of the things specified in section twenty-nine as grounds for withholding a discharge.

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In the Matter of Robert C. Rathbone, a Bankrupt.

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FEBRUARY, 1868.

**IN THE MATTER OF ROBERT C. RATHBONE, A  
BANKRUPT.**

**SPECIFICATIONS OF OPPOSITION TO DISCHARGE.**

Specifications of opposition to a discharge, under section thirty-one of the Bankruptcy Act, and General Order No. 24, must be as specific as the grounds for avoiding a discharge after it is granted, required by section thirty-four of the Act. The allegations must be allegations of fact, and must be distinct, precise, and specific, so as to advise the bankrupt what facts he must be prepared to meet and resist.

It is no ground of objection to a discharge that a debt was created through the false and fraudulent representations of the bankrupt.

An allegation that a statement in one of the bankrupt's schedules was false is insufficient. Such a statement must be willfully false to afford ground of objection.

An allegation that the bankrupt falsely testified as to a certain matter on his examination is insufficient, if it does not aver that the false swearing was willful, and that the fact was a material one.

An allegation that the bankrupt "is entitled" to certain real estate is a sufficient specification to show that the bankrupt has been guilty, under section twenty-nine, of negligence in delivering to the assignee property belonging to him.

Certain specifications in this case were held too vague and general.

**BLATCHFORD, J.** A creditor of the bankrupt has filed what purport to be five specifications of the grounds of his opposition to the discharge of the bankrupt. They are in substance as follows :

1. That the bankrupt has not set forth in his petition and schedules all his property ;

2. That, in his examination on oath before the register, he has not, in some material facts, stated the truth, respecting his property which should go to his assignee in bankruptcy ;

3. That he has been guilty of fraud in delivering to such assignee the property belonging to him ;

4. That he has been guilty of fraud in covering, concealing, and distributing his property ;

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In the Matter of Robert C. Rathbone, a Bankrupt.

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5. That he has been guilty of fraud generally, and of false representations concerning his property, and in its distribution among his creditors, under an assignment made by him in 1854, and of fraud and collusion with the assignee under that assignment; and that, from the time he made that assignment until now, he has been guilty of fraudulently conducting his business through collusive arrangements with others, who keep the bankrupt as a clerk, but really divide with him the profits of the business, and that the bankrupt, through his wife and brother and others to the creditor unknown, has concealed his property from the date of that assignment till now, and that they hold the same for his use and benefit, such conduct being for the purpose of defrauding the creditors named in his schedule annexed to his petition.

These specifications are all of them too vague and general to be triable. They are not at all specific. They point to nothing with any reasonable definiteness. They aver nothing on which an issue can be raised. They do not notify the bankrupt what specific and particular allegations of fact the creditor intends to prove. The only one of them which approaches the character of a proper specification, is that part of the fifth specification which states that the bankrupt is ostensibly a clerk but really a partner in some business; but this does not state what the business is, or who the copartners are. The specifications of the grounds of opposition to a discharge must, under section thirty-one of the Act, and General Order No. 24, be as specific as the specifications of the grounds for avoiding a discharge after it is granted, required by section thirty-four of the Act. The allegations must be allegations of fact, and must be distinct, precise, and specific, and must not be allegations merely in the language of section twenty-nine of the Act, or allegations so general as really not to advise the bankrupt what facts he must be prepared to meet and resist.

The fourth section of the Bankruptcy Act of 1841,

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In the Matter of Robert C. Rathbone, a Bankrupt.

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provided that the discharge, when duly granted, should be conclusive evidence of itself in favor of the bankrupt, unless it should be impeached for some fraud or willful concealment by him of his property, contrary to the Act, "on prior reasonable notice, specifying in writing such fraud or concealment." In *Brereton v. Hull* (1 *Denio*, 75), a discharge in bankruptcy was pleaded. To this plea there was a replication, generally alleging that the defendant was guilty of fraud, and of willful concealment of his property, and purporting to set forth three specifications. The first specification related to transfers of property for the purpose of preferring certain creditors, but did not describe the property, either as to kind or quantity, or state to whom it was conveyed, or what creditors were preferred. In respect to this specification, the Court said: "The specification is nearly in the words of the statute, and is quite too general to inform the defendant what charge he must be prepared to repel on the trial. If the plaintiff knows that there were any unlawful preferences in contemplation of bankruptcy, he can specify what in particular they were. If he has no such knowledge, this is, then, a mere fishing suit, which deserves no encouragement." The second specification named certain property as having been conveyed in fraud of the Act, but did not name the persons, or any of them, to whom it was conveyed. The Court held that this should have been done, and said: "The defendant should be fairly apprised of the proof which he may expect to meet on the trial. If the property was sold by retail or at auction, in small quantities, it would not be necessary to give the names of all the purchasers, and possibly the specification would be good without giving any of them. But then the pleading should state the necessity for omitting to give the names." The third specification alleged that the defendant had concealed property of considerable value. This was held bad, because it did not describe the property as to kind or quan-



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In the Matter of Robert C. Rathbone, a Bankrupt.

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tity, and did not state how or in what manner the concealment was effected, or when or in what stage of the proceedings it occurred. The same doctrine substantially was held in *Chadwick v. Starrett* (27 *Maine*, 14 *Shepley*, 138), and is approved by this Court.

After the foregoing decision was rendered, the creditors, by leave of the court, filed ten additional specifications of objection. The first six are sufficiently stated in the following decision. The other specifications were as follows :

7th. That said bankrupt's statement in Schedule B, No. 3, annexed to said petition, is wholly false, and so disclosed by him to be on his examination before the register—the facts being, that, at the time he swore to said schedule, he was, and now is, the owner of a life insurance policy on his own life, &c. (setting forth the particulars thereof).

8th. That the business of Rathbone Brothers & Co., brokers, &c., in Broadway, was started and built up by said bankrupt, and has so continued under his supervision to the present time, the yearly net profits whereof is now about \$35,000 per year. That said bankrupt professes to receive only about one-tenth of the annual profits of said business, as a clerk, and in lieu of salary, while his said wife represents by purchase, or pretended purchase, for \$4,000, a one-fifth interest in said business, all of which business, except those portions actually and not fraudulently sold to others, are assets in the hands of said bankrupt, and should inure to the benefit of his creditors.

9th. That much of the indebtedness of said bankrupt set forth in the schedule, annexed to his petition as contracted by the firm, was his own individual indebtedness, and was taken and used for his own personal benefit.

10th. That from and including the contraction of said indebtedness to the present time, every movement made by said bankrupt in relation to the collection of

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In the Matter of Robert C. Rathbone, a Bankrupt.

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moneys and contraction of indebtedness, and the means adopted by him to avoid its payment and prevent its collection, has been skillfully planned and executed in fraud of his creditors, his wife and brother covering his said unjust and fraudulent transactions, and that he, the said bankrupt, now has in his hands, or under his control, or in the hands of others for his use and benefit, more than sufficient to pay all his indebtedness.

For the bankrupt, *D. G. Barnitz*.

For the creditors, *H. P. Herdman*.

BLATCHFORD, J.—In this case, the creditor has, under the leave granted to him by the court, filed further specifications of the grounds of his opposition to the discharge of the bankrupt.

1. So much of the first specification as avers that the original indebtedness of the bankrupt to the creditor was created through the false and fraudulent representations of the bankrupt, is merely an averment that the debt was created by the fraud of the bankrupt. As such, the debt would, under section thirty-three of the Act, not be discharged by a discharge of the bankrupt. The fraudulent contracting of a debt is not made, by section twenty-nine, a ground for refusing a discharge, and probably for the reason that such debt will not be affected by the discharge. Besides, if the discharge could be refused because the debt was created through the fraudulent representations of the bankrupt, the nature, and character, and time, and place, and circumstances of the representations must be specified, and the particulars wherein they were false and fraudulent must be set forth; otherwise, the specification is not available for any purpose.

So far as the first specification avers that there is a false statement in Schedule A, No. 3, to the bankrupt's

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In the Matter of Robert C. Rathbone, a Bankrupt.

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petition, it is insufficient, because it does not aver that such statement was "willfully" false. Section twenty-nine requires that false swearing in a petition, schedule, or inventory, should be "willfully" false.

2. The second and third specifications relate solely to transactions by the bankrupt under and in regard to an assignment made by him in 1854. They do not set forth any ground that is covered by section twenty-nine of the Act.

3. The fourth specification is defective. It merely avers that a certain statement in Schedule A, No. 3, to the petition is "untrue." It ought to aver it to be "willfully" untrue.

4. The fifth specification, so far as it avers that the statements in Schedule B, No. 1, annexed to the bankrupt's petition is untrue, is defective in not averring it to be willfully untrue.

The portion of the fifth specification which avers that the bankrupt is entitled to the two lots in Sixty-third street, may be regarded as a sufficient specification to show that the bankrupt has been guilty, under section twenty-nine, of negligence in delivering to the assignee property belonging to him at the time of presenting his petition and inventory. Schedule B, No. 1, sets forth that the bankrupt has no real property, and it is to be assumed that he has delivered none to the assignee.

So much of the fifth specification as avers that the bankrupt is entitled to "other real estate" is too vague and general to be triable.

5. The sixth specification is defective. It avers that the bankrupt falsely testified, in respect to a certain matter, on an examination in this matter before the register, but it does not aver that the bankrupt willfully swore falsely on such examination in respect to such matter, nor does it aver that the fact in regard to which the false testimony was given was a "material fact," as is required by section twenty-nine.

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In the Matter of William Okell, a Bankrupt.

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6. The seventh specification is sufficient. It avers in substance willful false swearing by the bankrupt in Schedule B, No. 3, to his petition, in swearing that he had no choses in action. Whether the fact, that the bankrupt owned a life insurance policy on his own life, and did not set it forth among his assets, is to affect his discharge, is a question which will be disposed of hereafter.

7. The eighth specification I hold to be sufficient, as being, in substance, an averment of negligence in the delivery by the bankrupt to the assignee of property belonging to him at the time of the presentation of his petition.

8. The ninth and tenth specifications are altogether too vague and general.

The result is, that the portion of the fifth specification particularly mentioned above, and the seventh and eighth specifications, are triable.

If either party desires to take further testimony in regard to them, a reference will be made to Register Ketchum to take such testimony and report it to the court.

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FEBRUARY, 1868.

IN THE MATTER OF WILLIAM OKELL, A  
BANKRUPT.

WITNESS' FEES.

A bankrupt is bound to appear and submit to an examination, when ordered, without being paid witness' fees.

In this case the register had issued an order for the examination of the bankrupt, on the application of a creditor. On the return of the order, counsel appeared

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In the Matter of Jesse H. Robinson, a Bankrupt.

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for the bankrupt, and insisted that he was entitled to fees as a witness. The register held, that the bankrupt was bound to appear and be examined, pursuant to the order, without fees; and, at the request of the bankrupt, he certified the question to the Court.

BLATCHFORD, J. The register was correct in his decision.

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FEBRUARY, 1868.

## IN THE MATTER OF JESSE H. ROBINSON, A BANKRUPT.

### REGISTER'S COSTS.

The Register taxed the following fees for his own services in this case:

|                                                                                                             |        |
|-------------------------------------------------------------------------------------------------------------|--------|
| 1. Examining schedules, and certifying same correct, . . .                                                  | \$5 00 |
| 2. Certified copy of adjudication of bankruptcy, . . .                                                      | 0 45   |
| 3. Application for first meeting of creditors, . . .                                                        | 1 00   |
| 4. Certified list of creditors for warrant, . . .                                                           | 0 95   |
| 5. Supplemental warrant, \$2; application for meeting, \$1, . . .                                           | 3 00   |
| 6. Certified copies schedules for assignee, . . .                                                           | 4 45   |
| 7. One day's service, under special order of reference on petition<br>for final discharge, . . .            | 5 00   |
| 8. Order to show cause, and certifying copy for clerk, . . .                                                | 1 00   |
| 9. Application for second and third meetings, . . .                                                         | 2 00   |
| 10. Deposition of assignee on his return, . . .                                                             | 0 65   |
| 11. Service under special order to show cause why bankrupt should<br>not be discharged, . . .               | 5 00   |
| 12. Second and third meetings of creditors, . . .                                                           | 6 00   |
| 13. Services on examination of bankrupt and proceedings, and for<br>making certificate of conformity, . . . | 5 00   |
| 14. Discharge without opposition, . . .                                                                     | 2 00   |

On objection by the bankrupt to each of the foregoing items,

*Held*, That the 1st, 3d, 4th, and 8th items must be disallowed.

That the 6th, 7th, 10th, 11th, 13th, and 14th items must be allowed.

That the 2d item must be reduced to 35 cents; the 5th to \$2.00, for the warrant;  
the 9th to \$1.00; and the 12th to \$3.00.

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 In the Matter of Jesse H. Robinson, a Bankrupt.
 

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Form No. 4 is not a special order, under section forty-seven of the Act.  
 A printed paper is to be taxed for, as if it were written.

BLATCHFORD, J. In this case, the register has, on the request of the bankrupt, taxed the items of fees charged by the register against the bankrupt for services rendered by the register in the proceedings in this case. The bankrupt objected, before the register, to several items, including those hereafter set forth. The register, after hearing the objections, allowed some items and disallowed others. Among those allowed by the register, notwithstanding the objections of the bankrupt, were the following, in respect of which the bankrupt has applied to the court to review the allowance of them by the register. The register and the counsel for the bankrupt have been heard by the court in regard to the items so allowed under objection, which are these :

|                                                |        |
|------------------------------------------------|--------|
| “ 1. Examining schedules, and certifying same  |        |
| correct, . . . . .                             | \$5 00 |
| 2. Certified copy of adjudication of bankrupt- |        |
| cy, . . . . .                                  | 0 45   |
| 3. Application for first meeting of creditors, |        |
|                                                | 1 00   |
| 4. Certified list of creditors for warrant,    |        |
|                                                | 0 95   |
| 5. Supplemental warrant, \$2 ; application for |        |
| meeting, \$1, . . . . .                        | 3 00   |
| 6. Certified copies schedules for assignee,    |        |
|                                                | 4 45   |
| 7. One day's service, under special order of   |        |
| reference on petition for final dis-           |        |
| charge, . . . . .                              | 5 00   |
| 8. Order to show cause, and certifying copy    |        |
| for clerk, . . . . .                           | 1 00   |
| 9. Application for second and third meetings,  |        |
|                                                | 2 00   |
| 10. Deposition of assignee on his return,      |        |
|                                                | 0 65   |
| 11. Service under special order to show cause  |        |
| why bankrupt should not be discharged,         | 5 00   |
| 12. Second and third meetings of creditors, .  |        |
|                                                | 6 00   |

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In the Matter of Jesse H. Robinson, a Bankrupt.

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13. Services on examination of bankrupt and proceedings, and for making certificate of conformity, . . . . \$5 00
14. Discharge without opposition, . . . . 2 00"

I proceed to dispose of these items in their order.

*Item 1.* This is a charge for examining the bankrupt's petitions and schedules, and certifying the same to be correct, under General Order No. 7, and Rule 4 of this court. General Order No. 7 requires the Register to render the service, and Rule 4 of this court prescribes formalities to be observed in rendering it. The theory of the charge of \$5 for the service is, that it is allowed by that clause of section forty-seven of the Act which allows "for every day's service, while actually employed under a special order of the court, a sum not exceeding five dollars, to be allowed by the court." The item is \$5 for one day's service, examining the petition and schedules, and certifying the same to be correct. The register contends that the order of reference, Form No. 4, is a "special order of the court" within the meaning of the clause cited from section forty-seven. The only order under which the register acts, in performing the service in question, is Form No. 4. The point involved has been fully and ably examined by Judge Ballard of the Kentucky District (*In re Dean, Weekly Bankrupt Register*, vol. 1, p. 26), and I entirely concur with him in his decision. He holds that Form No. 4 is not a special order, but is an order required, by General Order No. 4, to be entered as of course in every case, and that it requires the register to do nothing which he is not required to do by the Act and the General Orders. The conclusive view is, that if Form No. 4 is a special order under section forty-seven, and if the register is, therefore, entitled to \$5 for a day's service under it for examining the petition and schedules, and certifying the same to be correct, there is nothing to prevent the register from claiming \$5 for every day's service for taking *any* proceedings

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In the Matter of Jesse H. Robinson, a Bankrupt.

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required by the Act in the case; because, by Form No. 4, he is authorized to make adjudication and take such other proceedings in the case as are required by the Act. And not only that, but, in addition to such *per diem*, he can also claim the specific fees allowed to him by section forty-seven, and by General Order No. 30, even though the whole of a given day's service may be only some one of the specific items for which a specific fee is allowed. Another view is, that a service which the register is required to render by General Order No. 7, and by Rule 4 of this court, cannot, with any propriety, be said to be a service in which he is employed under a special order of the court. This item is disallowed.

*Item 2.* The charge for a certified copy of the adjudication of bankruptcy, furnished to the bankrupt, is warranted by General Order No. 30. The paper is a paper in the proceedings. But, as it does not appear that the certificate contains more than one folio, the charge for the certificate must be reduced from 25 to 15 cents. The paper itself contained two folios, and is properly charged at 20 cents, being 10 cents for each folio. But General Order No. 30 inadvertently allows 25 cents for certifying a copy of a paper, whether the certificate consists of more than one folio or not. When the certificate consists of more than one folio, the charge of 25 cents for the certificate is proper, but when the certificate consists of one folio or less, the charge for the certificate can be only 15 cents. By section ten of the Act, the fees to be established by the Justices of the Supreme Court cannot exceed the rate of fees then allowed by law for similar services in other proceedings. The fee for a certificate, allowed by the fee bill in the Act of February 26th, 1853, is 15 cents per folio, and a larger fee is unauthorized. The charge in this item must be reduced to 35 cents, and is allowed at that amount. The bankrupt claims that the register, inasmuch as he uses Form No. 5, in the shape of a printed blank, in



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In the Matter of Jesse H. Robinson, a Bankrupt.

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making the copy of the adjudication, and only fills into it the necessary written matter, can charge only for such written matter by the folio, and cannot charge by the folio for the printed matter found in Form No. 5, which is contained in the copy. This ground is not tenable. The charge for the copy is allowed by General Order No. 30, at 10 cents for each folio of 100 words, whether the words are written or printed. The register may write them all if he chooses, and if, instead of doing so, he uses a printed form for a portion, that fact does not prevent him from charging for the whole by the folio, the General Order not having made any discrimination between a written copy and a printed copy.

*Item 3.* The charge of \$1, for the application for the first meeting of creditors, is claimed to be allowable under that clause of section forty-seven which allows "for every application for any meeting in any matter under this Act, one dollar." I am of opinion that this clause refers only to a meeting which is *applied for* in a substantial sense, such as a meeting of creditors applied for under section twenty-seven or section twenty-eight of the Act. The first meeting of creditors is not applied for in any such sense. Section eleven directs that the warrant shall authorize the marshal to give notice of the first meeting of creditors. The warrant, Form No. 6, requires the marshal to give such notice. No application for such meeting is contemplated or provided for by the Act or the General Orders, nor is any form for it prescribed, nor is it ever in fact made. It is purely a constructive service. Besides, it is covered by the fee of \$2 given for issuing the warrant, which includes all services of the register, prior to and in issuing the warrant, which are not otherwise specially provided for. This item is disallowed.

*Item 4.* The charge of 95 cents for "certified list of creditors for warrant," is for the list inserted in the warrant when it is issued by the register. This charge

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In the Matter of Jesse H. Robinson, a Bankrupt.

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is covered by the \$2 allowed for issuing the warrant. It is disallowed.

*Item 5.* For reasons which were satisfactory to himself, the register issued a supplemental warrant to the marshal in this case. Whether it was a proper case for a supplemental warrant is not a question before me now. The bankrupt is concluded as to that point by not raising it at the proper stage of the case. Section forty-seven gives a fee of \$2 "for issuing every warrant." This supplemental warrant was a warrant, and was issued. The fee of \$2 for it is allowed. The fee of \$1 for the application for the meeting of creditors called by the supplemental warrant, is disallowed, for the reasons given in disallowing item 3.

*Item 6.* The item for certified copies of schedules for assignee is allowed. Section four of the Act requires the register to furnish the assignee with a certified copy of the schedules of creditors and assets filed in each case. These schedules are papers within the meaning of General Order No. 30, and may be charged for at 10 cents for each folio for the copies, 15 cents for each certificate, if one folio or less, and 25 cents for each certificate if more than one folio. The amount must be fixed accordingly.

*Item 7.* The charge of \$5 for one day's service, under special order of reference upon petition for final discharge, is allowed. The order made on a petition for a discharge, so far as it refers it to the register "to make an order to show cause thereon, and to sit in chambers on the return of said order," and to certify to the court whether the bankrupt has in all things conformed to his duty under the Act, and has conformed to all the requirements of the Act, is a special order. It requires the register to render services not specifically enjoined on him by the Act or by the General Orders. The \$5 in this item is for the one day's service examining the papers and making the order to show cause.

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In the Matter of Jesse H. Robinson, a Bankrupt.

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*Item 8.* The charge of \$1, for order to show cause and certifying copy for clerk, is disallowed. This service is covered by the \$5 allowed in item 7. When the special order of reference on the petition for discharge, authorizing the register to make an order to show cause thereon, comes to the register, the first one day's service which he renders and charges for under item 7, is the making of the order to show cause. The charge of \$1 is sought to be upheld under that clause of General Order No. 30, which allows to the register "for every order made where notice is required to be given, and for certifying copy of the same to the clerk, one dollar." But this clause refers only to such an order as is named in General Order No. 8—an order "in any proceeding in which notice is required to be given to either party before the order can be made." The order to show cause, made by the register on a petition for a discharge, is not such an order.

*Item 9.* This is a charge of \$2 for application for second and third meetings of creditors. It is reckoned as two applications, one for each meeting, with a charge of \$1 for each application, under that clause of section forty-seven which allows \$1 for every application for any meeting in any matter under the Act. I think that these meetings may fairly be regarded as having been applied for to the register under General Order No. 25, but, as there was and need be but one application for the two meetings, the charge must be reduced to \$1 in the whole.

The new rule made by this court, January 23d, 1868, provides that hereafter, in cases of orders to show cause, made according to Form No. 51, on petitions of bankrupts for discharges from their debts, no meeting of creditors, except the first, shall be ordered or had, unless some assets have come to the hands of the assignee, but where, in any such case, any assets have come to the hands of the assignee, then the order to show cause shall

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In the Matter of Jesse H. Robinson, a Bankrupt.

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contain a provision, under General Order No. 25, for the holding of the second and third meetings of creditors, and for notices thereof. This rule was made upon the ground that General Order No. 25 does not, when read in connection with sections twenty-seven and twenty-eight of the Act, *require* the second and third meetings of creditors to be held in cases where there are no assets, there being no necessity for either of such meetings, unless there are assets to be divided, and neither of such meetings being a necessary preliminary requisite to the discharge of the bankrupt.

*Item 10.* This is the assignee's return, Form No. 35. The objection taken to this item is the same that is taken to item 2, in respect to the written matter inserted in a printed form. The objection is overruled. The return is a deposition, and the register has a right, under section forty-seven, to charge, for taking it, the fees allowed by law for taking a deposition. Whether the charge of 65 cents is the proper amount, on this basis, I have not the means of deciding.

*Item 11.* This charge of \$5 is for one day's service sitting in chambers on the return of the order to show cause. As such, it is allowed. It is a service rendered under the special order of reference made on the petition for a discharge, and is allowable for the reasons set forth in respect to item 7. It is not allowed on any idea that the order to show cause in Form No. 51 is a special order.

*Item 12.* This charge of \$6, for the second and third meetings of creditors, must be reduced to \$3. Section forty-seven allows \$3 for each day in which a meeting is held, and these meetings were held on one and the same day. The allowance is not for each meeting, but for each day in which any meeting or meetings is or are held.

*Item 13.* This is a charge of \$5 for one day's service examining the bankrupt and the proceedings, and mak-

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In the Matter of Nathan A. Son, a Bankrupt.

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ing a certificate of conformity. It is allowed for the same reasons for which item 7 and item 11 are allowed. It is a service under the special order of reference made on the petition for discharge, which requires the register to certify to the court whether the bankrupt has in all things conformed to his duty under the Act, and has in all things conformed to the requirements of the Act.

In ordinary cases, three days' services, and only three, are chargeable under this special order of reference—one day for the examination of papers and making the order to show cause, one day for sitting in chambers on the return of the order, and one day for finally examining all the papers, and making a certificate of conformity. So far as that order of reference authorizes or requires the register to pass the last examination of the bankrupt in case there is no opposition, it is not a special order, because he is authorized and required to render that service by section four of the Act and Form No. 4, which is a general order.

*Item 14.* This charge of \$2 for a discharge without opposition, is allowed. It is expressly given to the register by section forty-seven.

The result is, that the items objected to, amounting to \$41.50, are allowed at \$26.45.

*F. C. Nye*, for the bankrupt.

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FEBRUARY, 1868.

## IN THE MATTER OF NATHAN A. SON, A BANK- RUPT.

### VAGUE SPECIFICATIONS.

Specifications of objections to a discharge must not be vague and general. If they are such, they furnish no ground for refusing a discharge.

In this case, a creditor filed five specifications of the grounds of his opposition to the discharge of the bankrupt. They were as follows :

1. That the bankrupt has concealed part of his effects and his books relating thereto, and has not delivered to the assignee all the property belonging to him at the time of presenting his petition, with intent to defraud his creditors.

2. That, since the passage of the Act, he has made fraudulent transfers of his property, and has lost portions of his property in gaming, and has admitted false and fictitious debts against his estate.

3. That he has not, subsequently to the passage of the Act, kept proper books of account.

4. That he has, in contemplation of becoming a bankrupt, made transfers for the purpose of preferring creditors, and for the purpose of preventing his property from coming into the hands of his assignee, or of being distributed in satisfaction of his debts.

5. That he has been guilty of fraud in other respects, contrary to the true intent of the Act, and has, since its passage, mutilated his books or securities.

*S. E. Swain*, for the bankrupt.

*Merchant, Conable & Elliott*, for the creditors.

BLATCHFORD, J. Nothing could well be more general than these allegations. They are merely the language of section twenty-nine of the Act. They are all of them so vague that it is impossible for the court or the bankrupt to ascertain from them what specific acts or omission are relied on as grounds for withholding a discharge. The case stands as if there were no opposition to the discharge and no specifications filed, and, it appearing that the bankrupt has in all things conformed to his duty under the Act, a discharge is granted to him.

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In the Matter of Charles G. Patterson, a Bankrupt.

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FEBRUARY, 1868.

IN THE MATTER OF CHARLES G. PATTERSON,  
A BANKRUPT.

## FRAUDULENT DEBT.—JUDGMENT.—ARREST.

Where a judgment by default was rendered against a bankrupt in a State Court, on a complaint which showed that the debt, which the suit was brought to recover, was contracted by fraud :

*Held*, That the question, whether the debt represented by the judgment was created by the fraud of the bankrupt, was concluded by the judgment.

That, under the thirty-third section of the Bankruptcy Act, the judgment would not be affected by the discharge, any more than the debt which it represented.

That the bankrupt, therefore, was not exempt from arrest on an execution issued on the judgment in question.

On the 8th of November, 1866, one Shepard recovered a judgment against the bankrupt, in the Superior Court of the city of New York, for \$815.99, on his default for want of an answer, the summons and complaint in the action having been served on him personally, on the 8th of May, 1866, in the city of New York. The complaint set forth that, on the 9th of April, 1858, Shepard advanced to the bankrupt \$500, for the express purpose of buying and paying for some goods, to be shipped to another person, and the bankrupt received that sum from Shepard in a fiduciary capacity, as the agent of Shepard, to buy, pay for, and ship the goods, and agreed to collect the bill for the goods and refund the money to Shepard ; and that the bankrupt did not use the money for that purpose, but fraudulently misapplied it, and had never refunded it. On the 25th of June, 1867, the bankrupt filed his petition in bankruptcy, and was adjudicated a bankrupt on the 12th of September, 1867. He now represented to the court that, on the 29th of January, 1868, Shepard issued to the sheriff of the city and county of

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In the Matter of Charles G. Patterson, a Bankrupt.

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New York an execution on said judgment, commanding him to arrest the bankrupt and commit him to jail until he should pay the judgment or be discharged according to law, and that the execution was in the hands of the sheriff, and he was about to arrest the bankrupt on it. On these facts, the bankrupt asked this court to enjoin the sheriff from arresting the bankrupt on the execution, during the pendency of the proceedings in bankruptcy.

*Sandford, Le Baron & Porter*, for the bankrupt.

*E. F. Shepard*, for the creditor.

BLATCHFORD, J. It is claimed, on the part of the bankrupt, that the judgment in question is a debt which will be discharged by a discharge under the Act; that the original cause of action was merged in the judgment; that the judgment is now the only debt; that it cannot be said, under section thirty-three of the Act, that the debt was created by fraud, because the original claim, though created by fraud, was extinguished by the judgment, and the fraud disappeared when the judgment was obtained; that the judgment alone, and not the claim created by fraud, is provable under the Act; that, as the judgment is provable, a discharge will discharge it; that, therefore, the bankrupt is, by the last clause of section twenty-six, exempt from arrest on the judgment during the pendency of the proceedings in bankruptcy; and that, under section twenty-one, the court can enjoin an execution on the judgment.

I cannot assent to these views. The question as to whether the debt which is represented by the judgment was created by the fraud of the bankrupt, I regard as concluded by the judgment. It was recovered in a court of competent jurisdiction, on the personal service of a complaint setting forth all the facts making up the fraud. The question is, therefore, *res adjudicata*, as



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In the Matter of Charles G. Patterson, a Bankrupt.

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between the parties to the judgment, who are the same parties now before this court.

The only other question is, whether the debt is one excepted by section thirty-three of the Act from the operation of a discharge. That section provides, that "no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this Act." It is claimed by the bankrupt that, the debt in this case being in the shape of a judgment, this court cannot, in applying the thirty-third section, go behind the judgment, to see whether the claim on which the judgment was recovered was created by fraud; that the judgment, which is now the only debt, was created by the claim, and not by the fraud, and that, although the judgment was created by the claim and the claim by the fraud, yet the judgment was not created by the fraud. This view is unsound. Wherever the debt, no matter whether it be in the shape of a judgment or in any other form, was created by fraud, had its root and origin in fraud, there it is not to be discharged. To hold that the recovery of a judgment in an action where the gravamen of the complaint is fraud, condones that very fraud, by so merging the original claim, that the judgment cannot be said to be a debt created by the fraud set out in the complaint as the ground for recovering the judgment, would fritter away entirely the good sense and plain intention of the thirty-third section. The case of *Bangs v. Watson* (9 Gray, 211), cited to sustain this view, does not, in my judgment, support it, and I have been referred to no case which leads to any such conclusion.

The debt, in this case, not being one to be affected by a discharge, the bankrupt is not exempt from arrest upon it, and the application is denied.

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*The Steamship Alhambra.*

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FEBRUARY, 1868.

## THE STEAMSHIP ALHAMBRA.

COLLISION AT SEA.—STEAMER AND SCHOONER MEETING.—CHANGE OF  
COURSE BY SCHOONER.

A steamer, steering south half west, off Cape Hatteras, in the night, made a schooner's green light one and a half or two points on her starboard bow, and changed her course to south-southeast, which she kept for ten or twelve minutes, the position of the light remaining about the same, and then changed her course to south, and ran on that course for fifteen minutes, the light remaining in about the same position, and the green light then went out of sight, and a red light came in view, where upon the steamer's helm was at once ported, and her engine stopped and reversed, but too late to avoid the collision.

The schooner, sailing north by east, with the wind south by east, made the steamer's light directly ahead, and being uncertain whether she was a steamer or a sailing vessel, ported her helm, and changed her course to northeast by north, and kept that course till she saw that the vessel was a steamer approaching on a course which would run her down, when she put her helm hard a-port, and changed her course to east by north.

The speed of both vessels was about six or eight miles an hour, that of the schooner being a little the greater. Each vessel had her lights properly set and burning. The schooner was struck amidships on the port side, and sunk instantly.

*Held*, That, on this state of facts, the 15th and 18th articles of the Act of April 29th, 1864, prescribed the rules for the navigation of the vessels.

That it was a fault in the schooner to port her helm when she did so first, especially when she was uncertain whether the approaching light was that of a steamer or sailing vessel.

That that fault did not contribute to the collision.

That the fact that the position of the light ahead did not change after the steamer had changed her course to the eastward, ought to have been a clear indication to her that the schooner was proceeding in such a direction as to involve a risk of collision, and, under those circumstances, it was her duty to keep out of the schooner's way.

That the steamer ought to have ported before she did, and ought to have stopped and backed before she did.

That the last change of the schooner's helm to port, being made in the heat of danger, did not cause the collision, nor was it faulty.

This was a libel filed to recover damages for a col-

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The Steamship Alhambra.

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lision, which took place between two and three o'clock A. M. on the 26th of June, 1865, about fifty miles to the northward of Cape Hatteras, between the steamship Alhambra and the schooner Wonder, by which the schooner was sunk and totally lost. The schooner was owned by Kinney and Smith. Smith was her master. He lost his life in the collision. The schooner was on a voyage from Nuevitas, in Cuba, to Philadelphia, and had a crew of seven men, namely, her master and Kinney, who was on board as supercargo, and a mate, a cook, and three men before the mast. She also had two passengers. They were lost in the collision. The mate was so injured that he afterward died. The mate and McLean, one of the seamen, were the only persons on deck on the schooner at the time of the collision, and for some time before, except two men, who were asleep in the boat. The schooner had her proper green and red lights burning. The wind was fresh, and about south by east. The schooner had eight sails set. The steamer was bound from New York to Charleston.

The libel averred, that the course of the schooner was north by east; that the mate, who was on the lookout on the schooner, saw the lights of a vessel several miles distant, and directly ahead; that, until the vessels approached each other, it was uncertain to the schooner whether the vessel approaching her was a sailing vessel or a steamer; that, when the steamer's lights were discovered ahead, the course of the schooner was changed, by porting her helm, from north by east to northeast by north; and that she steadily kept on that course until after it was discovered that the approaching vessel was a steamer, and until she had approached so near as to make a collision imminent, and until it was found that the steamer was steering a course which would carry her against the schooner, when the wheel of the schooner was put hard to port, and she swung around to east by north, when the steamer, at full speed, and without

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The Steamship Alhambra.

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slowing, stopping, or backing, struck the schooner on her port side, about amidships, and cut her in two and sunk her. The libel also averred, that the lights of the schooner were made by the steamer nearly or quite ahead, when the vessels were several miles apart, the course of the steamer being at the time south half west; that, upon discovering the lights of the schooner, the course of the steamer was changed to south-southeast, which brought the schooner more upon the starboard bow of the steamer; that the mate of the steamer supposed the schooner to be a steamer; that the steamer ran for several minutes on a south-southeast course, the schooner retaining her relative position to the steamer, which was an indication that their lines were crossing; that the course of the steamer was then changed to the south, which brought the lights of the schooner dead ahead; that the steamer continued that course for a short time, when she found herself rapidly nearing the schooner, and her wheel was put hard to starboard, which brought her directly across the schooner; that the order was immediately given to port the steamer's helm, but, before her wheel had reached amidships, she struck the schooner, the speed of the steamer not being diminished, nor any signal given by her until after she had struck; that the collision was the fault of the steamer, in not having a proper lookout, in not porting instead of starboarding her wheel when she made the schooner's lights ahead, in not keeping still farther away after she had changed her course back to south and had made the schooner's lights ahead, in putting her wheel hard to starboard when she found herself approaching the schooner, in not blowing her whistle, in not slowing, stopping, and backing, and in not avoiding the schooner; that the schooner had a good lookout, and good and sufficient lights; and that her course was proper in changing to the right when she made the steamer's lights ahead, and in keeping to the right until the collision.

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The Steamship *Alhambra*.

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The answer averred, that the steamer had the proper lights set, and had a proper lookout; that, at about ten minutes past two o'clock, the lights of the schooner were seen from the steamer, in proper time, about from one-half of a point to two points on the starboard bow of the steamer, showing a green light; that the helm of the steamer was starboarded, and she was kept on a south-southeast course for ten or fifteen minutes, which brought the schooner about two and a half points on the starboard bow of the steamer, a green light only being in sight to the steamer all the time; that, if the schooner had kept her course, as she should have done, the steamer would have cleared her by from 300 to 500 yards, but that the schooner wrongfully suddenly changed her course to cross the bows of the steamer, her green light passed out of sight, and her red light came in view, so near as to show the schooner, when the steamer's helm was immediately put hard to port, and her engine was at once stopped and backed, but it was not then possible to avoid the schooner on the course she had thus suddenly taken; that the schooner had no proper lookout, and did not have the proper lights set, and did not pursue the course prescribed by the rules of navigation, in altering her course instead of holding her course and passing on the starboard side of the steamer; and that the collision was wholly caused by the violation, by the schooner, of such rules and law, and by her altering her course and crossing the bows of the steamer.

For libellant, *Beebe, Dean & Donohue*.

For claimants, *Benedict & Benedict*.

BLATCHFORD, J. It is clear, on the testimony, that each of the vessels had the proper lights set and burning, from the time the lights of each were discerned on board of the other, until the time of the collision, and that

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The Steamship Alhambra.

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there was nothing but negligence or willful inattention that could prevent either of the vessels from reading correctly the language spoken by the lights of the other. The schooner knew, or was bound to know, that the other vessel was a steamer. The steamer knew, or was bound to know, that the other vessel was a sailing vessel. On this state of facts, the rules of navigation are clearly prescribed by statute. Article 15 of the Act of April 29th, 1864 (13 *U. S. Stat. at Large*, 60), provides as follows: "If two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship." Article 18 provides, that where, by Article 15, the steamship is to keep out of the way, the sailing ship shall keep her course. The libel avers, that the course of the schooner was north by east when she made the lights of the steamer, the wind being south by east; that the schooner made the lights of the steamer directly ahead; that, for some time after the discovery by the schooner of the lights, and until the vessels had approached one another, it was uncertain whether the vessel approaching the schooner was a sailing vessel or a steamer; and that, when the lights were discovered ahead, by the schooner, that is, when the vessels were several miles apart, and while those on the schooner were uncertain as to whether the vessel approaching from directly ahead was a sailing vessel or a steamer, the schooner changed her course, by porting her helm, from north by east to northeast by north, a change of two points, and kept steadily on the latter course until after she discovered that the approaching vessel was a steamer and was on a course that would run down the schooner, when the schooner's helm was put hard to port till she headed east by north, in which position she was struck on her port side. The only person now living who was on the deck of the schooner at the time, and saw anything of the collision, was McLean, who had the wheel, the mate

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The Steamship *Abambra*.

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being on the lookout. McLean has been examined as a witness for the libellant. He says, that he was standing on the starboard side of the wheel when he first saw the approaching lights; that they were on the starboard bow, right ahead, his attention having been called to them by the mate; that the lights bore north by east from him; that, about a minute after seeing the lights, he, on an order from the mate, ported his wheel, and brought the schooner up to the northeast point; that, when that change had been made, it caused the lights to bear a point and a half or two points on the port bow of the schooner; that he ran on the northeast course a minute or a minute and a half and then changed to a course northeast by north; that, just at the moment of being struck, he put his wheel hard to port; and that it was from twenty-five to thirty minutes from the time he first saw the lights until the time of the collision. The testimony of McLean is explicit that, for full twenty minutes, he kept the northeast by north course. Now, by law, it was clearly the duty of the schooner to keep her course, as against the approaching steamer, and it was the duty of the steamer to keep out of the way of the schooner. It was, therefore, bad navigation in the schooner to port her helm, when she saw the lights right ahead, and change her course first to northeast and then to northeast by north, the approaching lights being those of a steamer. Especially was it wrong in the schooner to make this change of course when, as appears from the libel, she was uncertain whether the lights were those of a steamer or of a sailing vessel. I am not satisfied, however, that this fault in the navigation of the schooner makes her chargeable with the collision.

The steamer made the schooner one and a half to two points on her starboard bow, and, acting on the indications that the approaching vessel was a sailing vessel, did not port her helm, but starboarded it, in order to keep out of the way of the schooner. The change by the

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The Steamship Alhambra.

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steamer was from a course south half west to south-southeast, a change of two and a half points toward the east. The change made in the course of the schooner on sighting the steamer, was a change of from two to three points toward the east. The speed of each vessel was about the same—say six to eight knots an hour, that of the schooner being, perhaps, a little the greater. Now, on this state of facts, each vessel making the other nearly ahead, but a little on the starboard bow, one heading south half west and the other north by east, and each then changing to and running on a course about two and a half points further to the eastward, we should expect it to follow that, from the former vessel, the lights of the other vessel would, after the last change, take a bearing which would be preserved substantially unaltered during the running of the vessels on their several new courses. This result did follow. The testimony of Newbegin, the mate of the steamer, taken on the part of the claimants, shows that, while the steamer was running on her south-southeast course, which course she continued for ten or twelve minutes, the schooner continued all the time to bear about two and a half points on his starboard bow; that he then changed to a south course, and ran on that for fifteen minutes, and that the schooner still continued to bear not more than from two and a half to two and three-quarters points on his starboard bow; that the united speed of the two vessels was from sixteen to eighteen knots an hour; and that he first made the schooner's lights when she was about seven miles off. In twenty-five minutes, the vessels, at a united speed of sixteen knots an hour, would approach six miles and two-thirds of a mile nearer to each other. This approach of the schooner, without the bearing of her lights being substantially altered, while the course of the steamer was first south-southeast for ten minutes, and then south for fifteen minutes, ought to have been a clear indication to the steamer that the schooner was proceeding in such a



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The Steamship Alhambra.

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direction as to involve a risk of collision. Under these circumstances, it was the duty of the steamer to keep out of the way of the schooner. The schooner, after she took a northeast by north course, kept it up to the very jaws of the instant peril. Her change to a northeast by north course from a course north by east did not contribute to the collision. It was wrong in the steamer to persist in starboarding her helm, and running on a course which, from the bearing of the schooner's lights, and the freshness of the wind, it ought to have been evident, would soon bring the two vessels into peril of collision. The steamer ought to have ported her helm before she did. If she had done so, she would have cleared the schooner, as the movement which the schooner made in the heat of danger, in putting her helm hard to port, favored the chance that the steamer would, by porting, clear the schooner. Such movement of the schooner did not, on the evidence, cause the collision, nor was it faulty. The steamer ought to have kept out of the way. The schooner kept her course, and there was no special circumstance making it necessary for the steamer to take and keep the course she did. Moreover, the steamer did not soon enough slacken her speed, or soon enough stop and reverse. If she had done so at an earlier moment, she would have gone under the stern of the schooner, and so she would if she had ported at an earlier moment.

There must be a decree holding the steamer liable for the collision, and for the damages caused by it, with a reference to ascertain and report the damages.

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In the Matter of John Thompson, a Bankrupt.

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FEBRUARY, 1868.

IN THE MATTER OF JOHN THOMPSON, A  
BANKRUPT.

ADJOURNMENT.

The pendency of an examination of the bankrupt is good cause for an adjournment of the proceedings, on the order to show cause why the bankrupt should not be discharged.

In this case, when the order to show cause why the bankrupt should not be discharged was returnable, an examination of the bankrupt was pending, and a creditor requested an adjournment of the proceedings on the order to show cause. The bankrupt insisted that no adjournment could be had, unless the creditor first entered his appearance under General Order 24. The register held that the pendency of the examination was good cause for the adjournment requested, and that the adjournment could be had without requiring the creditor to enter his appearance under General Order 24. On the bankrupt's request, he certified the question to the court.

BLATCHFORD, J. The register was correct in his decision.

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FEBRUARY, 1868.

THE STEAMBOAT D. S. GREGORY.

COLLISION IN NEW YORK HARBOR.—VESSEL AT ANCHOR.—FOG.—  
SPEED OF FERRYBOAT.

Where a steamer, coming into New York harbor in a fog, was anchored by the pilot in charge of her about opposite to the slip of a ferry, coming to anchor there because the river was full of vessels, and her position was known to those on board of a boat plying on such ferry, and she sounded her whistle at proper

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The Steamboat D. S. Gregory.

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intervals, and rang a bell, and used all proper precautions to make her position known, and, about nine o'clock the next morning, the fog still continuing, she was run into by such ferryboat:

*Held*, That, on the evidence, it was not a fault in the steamer, contributing to the collision, to anchor where she did, and keep her anchorage during the fog.

That the fact that the ferryboat collided, in a fog, with a vessel at anchor, which used all proper precautions to give notice of her position, it being already known to the ferryboat that she was at anchor there, was sufficient evidence that the speed of the ferryboat was too great, there being no special circumstances to justify her maintaining the speed she did.

That the ferryboat was, therefore, liable for the damages.

This was a libel by Alfred Holt and others, owners of the steamship *Talisman*, to recover for a collision which took place about nine o'clock on the morning of the 15th of January, 1863, in the Hudson River, between the city of New York and Jersey City, between the steam ferryboat D. S. Gregory and the steamship *Talisman*. The *Talisman* was at anchor. She had come in from sea during the previous afternoon, and had then anchored nearly in the middle of the Hudson River, about opposite to the foot of Courtlandt street in the city of New York. The D. S. Gregory plied regularly between the foot of Courtlandt street and a slip in Jersey City nearly opposite. The *Talisman* came in during a very thick fog, which continued all through the night, and down to the time of the collision. She anchored where she did because the river was full of vessels, moving and at anchor, and a collision with some of them was feared if she proceeded further. She was anchored under the direction of the pilot who brought her in from sea. The position of the *Talisman* at her anchorage was known to those in charge of the D. S. Gregory, and they saw her after she had taken up her anchorage. Her position was not substantially changed down to the time of the collision. At that time she was headed up the river, the tide being ebb. She blew her steam whistle at proper intervals before and down to the time of the collision, and also sounded her bell, and

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The Steamboat D. S. Gregory.

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used all proper precautions to make known her position. The D. S. Gregory was on a trip from Jersey City to her berth at New York, and came in contact, during the fog, with the Talisman, on the port side of the latter, and damaged her seriously.

For libellants, *D. D. Lord*.

For claimants, *E. S. Van Winkle*.

BLATCHFORD, J. The answer sets up that it was a fault in the Talisman to anchor where she did in the fog, it being claimed that her anchorage place was in the line of the usual path of the ferryboat. I do not think, on the evidence, that it was a fault contributing to the collision, in the Talisman, to anchor where she did, and keep such anchorage during the fog.

I regard the Talisman as wholly free from fault, so far as the collision is concerned. The only question, therefore, is whether the D. S. Gregory was in fault in coming into collision with this vessel at anchor; and it is impossible to resist the conclusion that she was. Her rate of speed was too great. No positive rate can be prescribed. What would be a moderate rate of speed under one state of facts, would be an immoderate one under another. A steam vessel must, in a fog, reduce her rate of speed to a moderate rate, or abide the consequences of an immoderate one, unless some special reason is shown for maintaining the rate of speed adopted. The fact that the D. S. Gregory, while under way in a fog, collided with a vessel at anchor, which used all proper precautions to give notice of her position (it being already known to the D. S. Gregory that she was at anchor there), is sufficient evidence that the speed of the D. S. Gregory was not moderate, there being no special circumstances existing in the case to justify her maintaining the rate of speed she did. And this is true,

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In the Matter of Samuel M. Levy and Mark Levy, Bankrupts.

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without regard to what her actual rate of speed was, and without regard to the question whether she did or did not slow, stop, and back before the collision, and without regard to the question whether the manœuvres she made at the moment of collision were or were not correct. The collision resulted from her coming in contact, while under way, with the vessel that was at anchor, and was a consequence of the speed at which she was moving. In such a fog, her speed ought to have been as much less than it was, as would have been sufficient to enable her to avoid the vessel at anchor. She ought not to have gone so fast as not to have been able, by slowing, stopping, and backing, to avoid a collision; and, if the fog was so thick that, at the speed she had, with all the precautions she used, she could not avoid the collision, the conclusion is irresistible that her speed was not that moderate speed in a fog which is required by the well-settled rules of navigation.

There must be a decree for the libellants, with a reference to a commissioner to ascertain and report the damages caused by the collision.\*

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FEBRUARY, 1868.

IN THE MATTER OF SAMUEL M. LEVY AND  
MARK LEVY, BANKRUPTS.

WHO MAY OPPOSE A DISCHARGE.—SURETY.

Creditors who desire to oppose a bankrupt's discharge must prove their claims. Neither the discharge of the bankrupt, nor any step taken by the creditor in the course of the proceedings in bankruptcy in regard to his debt against the bankrupt, can release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise.

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\* This decision was affirmed by the Circuit Court, on appeal, in August, 1869.

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In the Matter of Samuel M. Levy and Mark Levy, Bankrupts.

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In this case, on the return of the order to show cause why the bankrupts should not be discharged, certain creditors, who had not proved their claims, appeared and desired to file objections. They presented an affidavit showing that they held obligations signed by sureties, in actions commenced before the proceedings in bankruptcy, to the effect that the bankrupts should perform the judgments recovered in the suits, which judgments were also recovered before the commencement of the bankruptcy proceedings, and that they were apprehensive lest, by proving their debt, they might imperil their rights as against the sureties. The register held that they could not file objections without proving their claims, and, on their request, certified the question to the court.

For the creditors, *C. H. Smith.*

For the bankrupts, *Benedict & Boardman.*

BLATCHFORD, J. The register was correct in his decision.

If a creditor proves his debt against a bankrupt, the only effect, under section twenty-one of the Act, is, that he cannot afterward maintain a suit against *the bankrupt* on the debt, and that proceedings pending thereon against *the bankrupt*, and unsatisfied judgments already obtained thereon against *the bankrupt*, are discharged and surrendered by the proving of the debt. But the creditor may still sue any one else liable on the same debt, and proceedings pending against others thereon, and unsatisfied judgments already obtained against others thereon, are not affected, discharged, or surrendered by the proving of the debt. In this respect, the twenty-first section must be construed in connection with the thirty-third section, which provides that "no discharge granted under this Act shall release, discharge, or affect any per-

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The Steamship Circassian.

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son liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise." Neither the discharge of the bankrupt, nor any step taken by the creditor, in the course of the proceedings in bankruptcy, in regard to his debt against the bankrupt, can have the effect to release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise.

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## Eastern District of New York.

FEBRUARY, 1868.

### THE STEAMSHIP CIRCASSIAN.

#### SALVAGE—PLEADING.

Labor in unloading the cargo of a ship, which is on fire and in danger of destruction, attended with danger to life, and of unusual severity by reason of the danger to the ship, are not simple stevedore's services, and would be ground for sustaining an action in admiralty to recover compensation for them.

The contract to render such services is none the less a maritime contract, because the compensation did not depend on the result.

Where a libel had been dismissed on exception, but leave had been given to amend, and a new libel was filed setting out a valid cause of action, but adding a second cause of action, which was substantially a repetition of the first libel which had been dismissed :

*Held*, That this was an irregular and improper mode of pleading, and the libel must be dismissed, as not within the spirit of the order giving leave to amend.

BENEDICT, J. This case, which has heretofore been before the court,\* upon exceptions filed to the original libel, now comes up again upon exceptions to the amended

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\* See vol. I., p. 209.

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The Steamship Circassian.

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libel. The original libel was dismissed upon the ground that under the adjudged cases binding this court, it could not, sitting in admiralty, entertain jurisdiction of a claim for stevedore labor. On application, leave was, however, given to amend, under which the present amended libel has been filed, to which exception is also taken upon the ground that it shows no facts which make the action other than one to recover for stevedore services, and consequently that, under the previous decisions, it must be dismissed. Upon the argument of the exceptions, it seemed to be assumed on the part of the claimants, that in order to sustain the libel, the facts presented must show a case of salvage, and it was argued that, upon the face of the libel, it appeared that it was no case of salvage, inasmuch as it is expressly averred that the services sued for were rendered in pursuance of an agreement to pay reasonable compensation for them without regard to the result. The assumption upon which this argument is based I cannot consider as well founded. There may well be a contract to render services to a ship in danger for a sum certain, without regard to the result, which, if it would not form the basis of a claim for salvage, in the strict sense of the word—that is, for a compensation exceeding the value of the services, and allowed out of considerations of public policy—would still be a maritime contract, enforceable as such in the admiralty, and to be adjudicated upon according to the principles applicable to cases of contract. (The A. D. Patchin, 1 *Blatchf.*, 414.) The facts set forth in this libel, in what is called the first cause of action, are sufficient, if proved, to make out such a case of contract clearly within the jurisdiction of a court of admiralty. These facts are, that the steamer was on fire in her lower hold, and in danger of being destroyed; that to save her, it was necessary to remove the cargo to get at the coal which was on fire, and to remove it; that owing to the fumes of the burning coal the labor could only be performed at the exposure of life; that



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The Steamship *Circassian*.

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the danger to the ship required unusual labor by day and by night, which the libellants performed at request of the owner. The distinguishing features which these facts present are, that the services in question were performed in aid of a ship in danger of destruction; that they were attended with danger to life, and were unusual in their severity by reason of the danger of the ship. Such circumstances have been considered as sufficient to change the character of a contract of affreightment where the agreement was to transship a cargo for a remuneration "according to the services rendered and the risk encountered" into a salvage contract. (The *Westminister*, 1 *W. Rob.*, 229.) And in my opinion they change the character of the services sued for in this case, and render inapplicable the decisions upon cases of simple stevedore labor—decisions which I feel bound to follow, but which I conceive to be without any solid foundation in principle. My conclusion, therefore, is, that the facts set forth in this libel, and designated the first cause of action, are sufficient, if proved, to enable the libellants to maintain their action. But this libel, in addition to the matter already considered, contains what is called a second cause of action, which appears to be the same transaction again set forth in a different form, and here presenting only the features of a simple claim for stevedore labor. It is, in fact, no more than the contents of the original libel once dismissed again presented to the court in the same form, and designated a second cause of action. Such a mode of procedure is irregular and improper, and could hardly have occurred had proper attention been paid by the draughtsman, and I shall mark my disapproval of it by dismissing the libel under the fourth exception, as not within the spirit of the order giving leave to amend. Leave is given to file a proper pleading upon payment of costs of the exceptions.

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The Bark John G. Paint and Her Cargo.

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FEBRUARY, 1868.

## THE BARK JOHN G. PAINT AND HER CARGO.

SALVAGE.—LYING BY VESSEL IN DISTRESS.—DUTY OF SALVORS.—  
APPORTIONING SALVAGE.

Where a bark bound to New York, which had lost her rudder in a gale, was fallen in with, off the New Jersey coast, by a brig bound to Boston, which took off from the bark the captain's wife and family and a sick sailor, and agreed to keep by her, and the brig accordingly kept in company of the bark for six days, at times towing her, in the course of which the brig lost two hawsers and an anchor, and her master had his leg and two fingers broken by the towing hawser, the command thus devolving on the mate; and on the sixth day they made land, which turned out to be Absecom, and thereupon, though the wind and weather were favorable for keeping on, the mate ordered the hawser, by which he was towing the bark, to be cast off, and directed the bark to anchor, and she lay at anchor all night; and the next morning, before she came back to the bark, the latter engaged a tug to tow her to New York; the bark and her cargo being worth \$70,000 or \$80,000:

*Held*, That the case was clearly one of meritorious salvage service on the part of the brig.

That the same law which gives to salvors a reward exceeding any value of the labor bestowed, exacts of them all diligence, and is careful to mark any relaxation of that anxious solicitude for the safety of a vessel in distress, the encouragement of which is the object of all salvage reward.

That the action of the mate in not keeping on with the vessels when off Absecom, but anchoring the bark, was a mistake.

That the court would allow twenty per cent. of the value of the bark and her cargo as salvage, less \$8,500, deducted on account of such mistake.

That the court would allow to the owners of the brig the expenses incurred in performing the salvage, and one-half the remainder, by reason of the increased hazard to their vessel in consequence of the disabling of the master.

That the master was also entitled to a liberal portion by reason of his injuries, and that the mate's share must be diminished in consequence of his mistake.

This was a libel filed on behalf of the owners, master, and crew of the brig Sallie Brown, to recover salvage for services rendered to the bark. The facts sufficiently appear in the opinion of the court.

For libellants, *Scudder & Carter and D. D. Lord*.

For claimants, *Owen, Gray & Owen*.

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The Bark John G. Paint and Her Cargo.

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BENEDICT, J. The facts in this case, which can hardly be said to be in dispute, disclose a clear case of meritorious services rendered to a vessel disabled at sea by the loss of her rudder, consisting of lying by her, and from time to time towing her, for the space of six days.

It is quite evident that it was, in a great degree, owing to the salvors that the bark was not abandoned at sea, and their efforts resulted in the safe arrival of the bark at her port of destination.

The only circumstance at all detracting from the merit of the salvors is, that after Absecom was made, and when the wind was fair, and both vessels might well have proceeded to New York, the bark was directed to cast off the hawser and come to anchor, which she did, and was thus compelled to pass a night in a position of some danger from passing vessels, and when, in case of a blow, she might have gone ashore. This circumstance was claimed to amount to an abandonment of the bark by the salvors, and it was insisted that all claim to salvage was forfeited thereby.

Upon a careful consideration of the evidence, I am satisfied that there was no intention on the part of the salvors of abandoning the bark, but, on the contrary, that they directed her to anchor with the intention of standing by her during the night, and taking her into New York in the morning; and would have done so, had not the master of the bark in the morning, and with the brig in sight bearing down for him, hastened to employ a tow-boat to take him in.

Nevertheless, it was a mistake not to have proceeded during the night, instead of anchoring; occasioned, it would seem, by a doubt as to his precise locality on the part of the mate of the bark, upon whom the responsibility had then devolved, the master having been disabled by a broken leg. This mistake caused some additional peril to the bark during the night, which better seamanship

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The Bark John G. Paint and Her Cargo.

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on the part of the brig would have avoided. No harm resulted from the mistake beyond the delay ; and yet it detracts from the merit of the salvors, as the position of the bark called upon the mate to make every effort to bring her into port without delay, and he could with diligence have satisfied himself as to his real locality, about which no doubt was entertained on board the bark, and could without danger have proceeded during the night.

The same law which gives to the salvors a reward exceeding any value of the labor bestowed, exacts of them all diligence, and is careful to mark any relaxation of that anxious solicitude for the safety of a vessel in distress, the encouragement of which is the object of all salvage rewards.

All the other circumstances of the case favor a liberal reward to the salvors.

They fell in with the brig in mid-ocean, themselves bound to Boston, the brig to New York. She was in distress, and at the captain's request the salvors took on board their vessel from the bark the captain's wife, three children, a servant girl, and a sick man, and agreed to stand by her and assist her into port. Had they refused their services, the master of the bark, as he was situated, would doubtless have concluded that he would be justified in abandoning his vessel.

During the six days following the salvors kept by the bark, part of the time towing her, and at times not wholly without danger. In the performance of this service, two hawsers belonging to the brig were lost, as was also her anchor, and her master had his leg and two of his fingers broken by the towing hawser—a circumstance which, while it increased the responsibility of the mate, in case of bad weather or accident, would have greatly increased the risk of the brig and her cargo. In addition to the loss of anchor and hawser, the brig was put to the expense of insurance from New York to Boston. No

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The Bark John G. Paint and Her Cargo.

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other loss was sustained by the brig. During most of the time the wind was fair and the weather fine. The value of the bark and her cargo, not including the duties upon her cargo, appears to have been between \$70,000 and \$80,000. No tender of any sum as salvage was made, but a valid claim to the extent of \$3,000 was conceded, upon the argument by the claimant of the bark.

The libellants claim twenty-five per cent. Upon considering all the circumstances, I shall award twenty per cent. of the net value of the bark, cargo, and freight, less \$3,500, deducted by reason of the failure to proceed when off Absecom.

Let a reference be had to ascertain the value of the bark, cargo, and freight, and the question of apportioning the salvage among the salvors await the coming in of the report.

The amount of the salvage having been fixed at \$8,954.06, the court, in appropriating it, rendered the following opinion :

BENEDICT, J. In disposing of the question of apportionment, I think it necessary only to say that in fixing the amount to be awarded to the owners of the salving ship, I have considered them entitled to a liberal share, from the circumstance that the hazard to their vessel was increased by the injury which the master sustained in effecting the salvage, substantially disabling him, and leaving their vessel under the command of a mate.

To the master I have also awarded a liberal portion from the fact that he had a leg and two fingers broken in effecting the salvage, which confined him to the hospital for a considerable period, and from which he has not yet entirely recovered.

The chief-mate was by reason of the injury to the master compelled to assume an increased responsibility, which he is entitled to have considered in determining

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The Steamboat Empire State.

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his portion ; but I award him less than I should have otherwise done, because of his mistake in directing the distressed vessel to anchor in a dangerous place, instead of proceeding with her at once into port—which mistake entailed a considerable expense, and would not, in my opinion, have occurred, had the mate been more solicitous for the safety of the distressed vessel.

The salvage will be accordingly apportioned as follows :

Out of the gross salvage, let the costs be paid, and to the owners of the salving vessel the sum shown to have been expended by them, or necessarily disbursed by reason of the salvage service—to wit, the sum of \$1,597.97. Let the net salvage remaining be divided equally, and one-half, to wit, the sum of \$3,604.25, be paid to the owners as their portion of the salvage. Let one-half the remainder, to wit, the sum of \$1,802.12, be paid to the master of the salving vessel. Out of the balance remaining, let the mate and second mate have an equal portion, to wit, \$375 each. And let the remainder, to wit, \$1,052, be divided equally among the seamen of the salving vessel.

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FEBRUARY, 1868.

## THE STEAMBOAT EMPIRE STATE.

## COLLISION.—DAMAGES.

Where a vessel injured by collision, was sold at auction, and afterward repaired by the buyers :

*Held*, That the damages to be allowed in an action for the collision were to be arrived at by a reference to the cost of those repairs, instead of the result of the sale.

That interest was to be allowed on the value of the cargo and freight and on the repairs.

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The Steamboat *Empire State*.

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This case came up on exceptions to the report of a commissioner to whom it had been referred, to ascertain the damages occasioned to the schooner *Goldfish* by a collision with the *Empire State*. The vessel, after the collision, was raised, and was then found to be greatly injured, both by the blow and by a fire which was caused by the burning of the lime with which she was laden, and she was thereupon sold at public auction in her damaged condition. She was afterward repaired by the buyers at a cost of \$6,282.86. This included, however, replacing rigging, sails, anchors, and boat, which it appeared were not injured, and were not sold at auction with the vessel. The commissioner allowed the full cost of the repairs and interest, with the value of the cargo lost, and the freight, but excluded the sum of \$300, proved to have been the value of the time of the purchaser, who superintended the repairs himself, and excluded interest on the cargo and freight.

BENEDICT, J. Under the decision of the Supreme Court in the case of the *Catharine* (17 *How.*, 170), the rule adopted by the commissioner of ascertaining the damage by a reference to the cost of repair, instead of the result of the sale of the vessel before repairs, was correct. But from the cost of repairs should be deducted the value of anchors, sails, rigging, boat, &c., which were not injured or sold, and which are included in the amount reported; while, on the other hand, there should be added the sum of \$300, that being the proved value of the time of the person engaged in superintending the repairs. Aside from these items, the report appears to me to be correct, under the rule given by the case of the *Catharine*, which is there laid down as a positive rule, without exception. As to interest, it would seem that it must be allowed upon the value of the cargo and freight.

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In the Matter of Louis Glaser, a Bankrupt.

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## Southern District of New York.

MARCH, 1868.

### IN THE MATTER OF LOUIS GLASER, A BANKRUPT.

ARREST OF BANKRUPT.—PROTECTION.—POWER OF THE COURT.—GENERAL ORDER No. 27.—HABEAS CORPUS.

The "protection" spoken of in the fourth section of the Bankruptcy Act, means protection to the bankrupt from being arrested in cases where he is not liable to arrest, under the twenty-sixth section.

The provisions of General Order No. 27, so far as they authorize the discharge, from arrest or imprisonment, of a bankrupt arrested on process founded on a claim provable in bankruptcy, where that claim is one from which his discharge in bankruptcy will not release him, are not warranted by the twenty-sixth section of the Act.

The granting of such protection is an act done "under and in virtue of the bankruptcy." So, also, is the enforcing of such protection.

The District Court has jurisdiction, therefore, under the first section of the Act, to enforce such protection.

The court also has power, if a bankrupt is arrested in violation of the twenty-sixth section of the Act, to release him from imprisonment, by *habeas corpus*, under the Act of February 5th, 1867 (14 *U. S. Stat. at Large*, 385).

Where a bankrupt was arrested in an action in a State court on allegations of fraud in contracting the debt to recover which the action was brought, and gave bail, and applied to this court, on affidavits denying the allegations of fraud, for an order discharging him from arrest, and discharging the bail:

*Held*, That the court was competent to give him the relief sought, provided his arrest was founded on a debt from which his discharge in bankruptcy would release him.

That the court must inquire into that question of fact, and decide it on this application. \*

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\* In the case of Kimball, decided in November, 1868, this court modified these views, and held that, if the arrest in the State court appeared, on the face of the papers, to be founded on a debt from which a discharge in bankruptcy would not release the debtor, the bankruptcy court was concluded, and would not inquire into the question whether the allegations in such papers were true or not.



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In the Matter of Louis Glaser, a Bankrupt.

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In this case, the bankrupt filed his voluntary petition in bankruptcy on the 13th of January, 1868. Among the debts set forth in his petition was one to Townsend & Yale, of \$451.20, for merchandise sold by them to him. On the 5th of February, 1868, Townsend & Yale commenced a suit against him in the Superior Court of the city of New York, to recover the debt. The complaint in the suit was founded solely on a sale and delivery of goods to the amount of the debt. On the same day the bankrupt was arrested by the sheriff of the city and county of New York, on an order of arrest granted by the State court on the 4th of February, 1868, which required him to be held to bail in \$650. The ground of arrest, set forth in the affidavit on which the order of arrest was granted, was that the bankrupt was guilty of a fraud in contracting the debt, and the circumstances alleged to constitute the fraud were set forth in the affidavit. The bankrupt now showed to this court, by affidavit, that, on the 15th of January, 1868, he was adjudicated a bankrupt, and received from the register a certificate of protection; that, on his arrest, he gave to the sheriff the bail required; that all the allegations of fraud contained in the affidavit on which the order of arrest was granted were untrue; and that the debt to Townsend & Yale was one provable in bankruptcy, and one from which a discharge in bankruptcy would release him. He therefore applied to this court for an order discharging him from arrest, and discharging the bail which he had given. The application was founded on the last clause of the twenty-sixth section of the Bankruptcy Act, which provides that "no bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy, in any civil action, unless the same is founded upon some debt or claim from which his discharge in bankruptcy would not release him."

The creditors in this case had not proved their debt in the bankruptcy proceedings, and they raised an objec-

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In the Matter of Louis Glaser, a Bankrupt.

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tion to the jurisdiction of this court to grant the relief asked by the bankrupt, on the ground that no power was conferred on this court, by the Bankruptcy Act, to enforce the protection from arrest given by the twenty-sixth section, even though it should find that the bankrupt was arrested after the commencement of the proceedings in bankruptcy, and that his arrest was founded on a debt from which his discharge in bankruptcy would release him. The point taken was, that the Circuit Court for this district was the proper court to administer the relief sought, and not the District Court; and that, under the second section of the Act, the Circuit Court had "a general superintendence and jurisdiction of all cases and questions arising" under the Act, and, therefore, of this question, which arose under the twenty-sixth section, and could, on the application of the "party aggrieved, hear and determine the case." It was urged, that the jurisdiction invoked by the bankrupt on this application was not within the special grants of jurisdiction given by the first section of the Act to the District Court; that this was not a case or a controversy arising between the bankrupt and a creditor who claimed a debt or demand under the bankruptcy; that it did not concern the collection of the assets of the bankrupt; that it did not concern the ascertainment or liquidation of any lien or other specific claim on any of such assets; that it did not concern the adjustment of any priority or conflicting interest, in the sense in which that language was used in the first section; that it did not concern the marshalling or disposition of any of the funds or assets of the bankrupt; and that it did not concern any act, matter, or thing to be done by this court under or in virtue of the bankruptcy, within the meaning of that language in the first section.

For the bankrupt, *Henry Morrison*.

For the creditors, *John J. Townsend*.

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In the Matter of Louis Glaser, a Bankrupt.

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BLATCHFORD, J. The first clause of the first section of the Bankruptcy Act gives to the District Court original jurisdiction in this district in all matters and proceedings in bankruptcy; and authorizes it to hear and adjudicate upon the same according to the provisions of the Act; and that general grant of jurisdiction is followed by a special grant, extending such jurisdiction "to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy." Registers are, by section three, to be appointed, "to assist the judge of the District Court in the performance of his duties" under the Act. By section four, power is given to every register, and it is made his duty, "to grant protection." This undoubtedly means protection to the bankrupt from being arrested in cases where he is not liable to arrest—protection from arrests, to which, by the twenty-sixth section, he is not liable. The justices of the Supreme Court have so construed it, for not only have they, by General Order No. 5, defined one of the powers of a register to be to grant protection on the surrender of a bankrupt, but they have, by General Order No. 4, provided that a bankrupt "may receive from the register a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court." So also they have, by General Order No. 27, provided that, if a bankrupt is "committed after the filing of his petition, upon process in any civil action founded upon a claim provable in bankruptcy, the court" (meaning the court in which his petition is filed) may, upon his application, "discharge him from such imprisonment;" and that, "if the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the District Court, upon his application, may issue a writ of *habeas corpus* to bring him before the court, to ascertain

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In the Matter of Louis Glaser, a Bankrupt.

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whether such process has been issued for the collection of any claim provable in bankruptcy, and, if so provable, he shall be discharged, if not, he shall be remanded to the custody in which he may lawfully be." These provisions of General Order No. 27, so far as they authorize the discharge from arrest or imprisonment of a bankrupt arrested on process founded on a claim provable in bankruptcy, where the claim is one from which his discharge in bankruptcy will not release him, are not warranted by the twenty-sixth section of the Act. By the tenth section of the Act, the justices of the Supreme Court are required, subject to the provisions of the Act, to frame general orders for carrying the provisions of the Act into effect, but they are not authorized to extend the exemption of a bankrupt from arrest beyond the limits prescribed by the twenty-sixth section of the Act. By the thirty-third section of the Act, a debt which cannot be discharged is yet made provable. By the twenty-sixth section, though a debt is provable, it may, if not dischargeable, be the foundation of an arrest. The twenty-seventh General Order goes beyond the Act, by making exemption from arrest coextensive with the provability of a debt. But the twenty-seventh General Order, in so far as it is consistent with the Act, and in so far as it applies to debts or claims which will be released by a discharge in bankruptcy, is a clear indication that the justices of the Supreme Court understand the Act as giving to the District Court power to enforce the exemption from arrest to which a bankrupt is entitled under the Act. The twenty-sixth section confers such exemption. One of the means prescribed by the Act for securing it, is a protection against arrest, as a muniment or safeguard. The giving of this protection by the court or a register is an act done "under and in virtue of the bankruptcy." The enforcing such exemption from arrest, when a bankrupt is entitled to it by section twenty-six, whether a protection has been granted

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In the Matter of Louis Glaser, a Bankrupt.

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or not, and whether a protection granted has been violated or not, is an act done "under and in virtue of the bankruptcy." The exemption from arrest is conferred by section twenty-six, because the party is adjudged a bankrupt by the District Court; and the enforcing of such exemption by affirmative action is clearly an act "to be done under and in virtue of the bankruptcy." Being such, the jurisdiction of the District Court in which the bankruptcy proceedings are pending, clearly extends, under the first section of the Act, to the doing of this act by any appropriate method. Where the bankrupt is not in close custody, a *habeas corpus* may not be necessary. A simple order may suffice to give the requisite relief. The order will be an order in bankruptcy, and, by the first section of the Act, full authority is given to the court to compel obedience to all orders and decrees passed by it in bankruptcy, "by process of contempt and other remedial process." In some cases, a *habeas corpus* may be necessary, and such a remedy is contemplated by one provision in General Order No. 27. Irrespective of that provision, if a bankrupt is arrested in violation of the twenty-sixth section of the Act, and is thus restrained of his liberty in violation of a law of the United States, this court, or the judge thereof, has power, under the Act of February 5th, 1867, entitled "An Act to amend 'An Act to establish the judicial courts of the United States,' approved September twenty-fourth, seventeen hundred and eighty-nine" (14 U. S. Stat. at Large, 385), to issue a writ of *habeas corpus* and release him from his imprisonment. It follows, therefore, that this court is competent to grant to the bankrupt in this case the relief sought by him, provided his arrest was founded on a debt from which his discharge in bankruptcy would release him. This court must necessarily inquire into that question, and decide it for itself on this application. It is a disputed question of fact, which cannot be decided on *ex parte*

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In the Matter of William H. Little.

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affidavits, whether the debt in this case was contracted by the fraud of the bankrupt, and is, therefore, one from which his discharge in bankruptcy would not release him. If the bankrupt desires it, a reference will be ordered, under section thirty-eight of the Act, to take testimony on the question, and the application will be heard and decided on the testimony so taken.

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MARCH, 1868.

## IN THE MATTER OF WILLIAM H. LITTLE.

## COPARTNERSHIP.—AMENDMENT.

Where a bankrupt filed his petition, in which there was no allusion to the fact that he was a member of a firm, although the schedule showed debts contracted by him as member of a firm, and that there were credits due to said firm, and he was adjudicated a bankrupt, and an assignee was duly chosen by the creditors, and the bankrupt then presented a petition to the register stating that he was a member of a firm, and asking leave to amend his petition and schedules so as to allow the other member of the firm to be joined with him, so that he might be discharged from the debts of the firm, which the register refused:

*Held*, That the register should have granted his petition. The bankrupt had prayed to be discharged from all his debts, and could not be discharged from the debts of the firm until the partner was brought in.

The bankrupt, Little, in this case, filed his petition on December 10th, 1867, and was adjudged a bankrupt, and on February 8th, 1868, at the first meeting of creditors, an assignee was appointed, and the assignment executed.

The petition made no allusion to a copartnership, but, in the schedules attached to the petition, it appeared that debts had been contracted by him in a firm name, and that there were credits due to the firm.

On February 25th, 1868, the bankrupt presented to the register a petition, stating that he had filed his petition as a member of a firm, but had omitted to include his

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In the Matter of William H. Little.

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partner Dana, and praying for leave to amend his petition and schedules so as to permit his partner to be joined with him in his final order of discharge, adjudging him discharged from the debts of the firm.

The register denied the request of the petitioner, and certified the question to the court.

BLATCHFORD, J. I think that the register erred in denying the motion of the bankrupt, which was, that he be permitted to amend his petition and schedules in such manner as will permit his copartner to be joined with him in the proceedings in regard to the bankruptcy of the firm. The petition, which I have examined, is an individual petition, setting forth only one schedule of debts and one inventory of assets, both of which are stated in the petition to be the individual debts and assets of the petitioner. But the schedule of debts shows that a large portion of the debts consists of debts of a copartnership, of which the petitioner was a member, and the inventory of assets shows that part of the assets consists of credits due to said copartnership. Under these circumstances, as the petitioner prays to be discharged from all his debts provable under the Act, and some of the debts set forth in the schedule annexed to his petition are debts of the said firm, the petition is one to have the firm declared bankrupt on the petition of one of its partners, within the provisions of section thirty-six of the Act, and of General Order No. 18. As Dana did not join in the petition of Little, he ought to have been brought in, by proper proceedings, under General Order No. 18, before an adjudication of bankruptcy was made on the petition of Little. The defect is now sought to be remedied by Little. His petition requires to be amended, and his schedules require to be amended. He asks to be allowed to amend them so as to join Dana with him in the proceedings. Dana can be so joined, either by joining voluntarily in the petition of Little, or

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*In the Matter of William H. Little.*

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by being brought in, on notice, under General Order No. 18. When he is so brought in he can be discharged from his debts, including the debts of the firm ; and, until Dana is so brought in, Little cannot be discharged from the debts of the firm, because the theory and intent of section thirty-six of the Act, and of General Orders Nos. 16 and 18, are that the creditors of a firm shall be required to meet but once, and in one bankruptcy forum, all questions in regard to the bankruptcy of the firm, and in regard to their debts against the firm, and in regard to the administration in bankruptcy of the assets of the firm.

Section twenty-six provides, that the bankrupt shall "be at liberty, from time to time, upon oath, to amend and correct his schedule of creditors and property, so that the same shall conform to the facts," and General Order No. 33 prescribes regulations in regard to the amendment of schedules. General Order No. 7 provides, that "the court may allow amendments to be made in the petition and schedules, upon the application of the petitioner, upon proper cause shown, at any time prior to the discharge of the bankrupt." General Order No. 7 confers on the register the power of ordering amendments of any proceedings. The case was, therefore, a proper one for the register to allow the bankrupt to amend his petition and schedules, for the purpose set forth in his application to amend.



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In the Matter of Henry C. Bolton, a Bankrupt.

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MARCH, 1868.

IN THE MATTER OF HENRY C. BOLTON, A  
BANKRUPT.

## RIGHT OF CREDITOR HAVING SECURITY.

A creditor, who has a security for his debt, may prove his claim for the overplus, without abandoning the security, but must set forth the value of the security, and may vote, on the choice of an assignee, upon such overplus.

In this case the bankrupt and creditors requested the register to certify a question as to the rights of a creditor who held a security for part of his claim.

The register held, that a creditor having security may prove his claim, to the amount exceeding the value of the security, without abandoning it, but that he was bound to set forth the value of the security; and that he might vote as a creditor in respect of the overplus proven by him, in the choice of an assignee.

BLATCHFORD, J. The view of the register is correct.

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MARCH, 1868.

## THE SCHOONER CATAWANTEAK.

## SEAMAN'S WAGES.—DESSERTION.

Where a seaman shipped in New York for a voyage to Tampico and back, and, on the voyage back, the vessel put in at Key West for repairs, and, when she was ready to sail, he was not to be found, having gone ashore, without leave, to get some articles belonging to the vessel, which he had previously taken ashore to be washed, and the master shipped another man in his place and sailed without him, and he afterward came to New York, brought the articles to the vessel, and demanded his wages:

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The Schooner *Catawanteak*.

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*Held*, That, on the facts, the libellant had no intention of deserting the vessel, and did not desert, so as to incur a forfeiture of his wages under the twenty-fifth section of the Act of August 18th, 1856.

That, as neither the name of the seaman, nor the fact that he was absent without leave, were entered in the log-book, the libellant had not forfeited his wages under the fifth section of the Act of July 20th, 1790.

This was a libel for seaman's wages. The libellant shipped by the name of Albert Wright, on the shipping-articles, as cook and steward, for a voyage from New York to Tampico, Mexico, and back to a port of discharge in the United States, on the 3d of July, 1867. He went in the vessel to Tampico, and thence to Key West, where the vessel put in in distress for repairs, and where she was detained for some time. On the 31st of October, 1867, when the vessel was ready to leave Key West for New York, the libellant could not be found, he having gone ashore, without permission, for the purpose of getting some articles belonging to the vessel, which he had previously taken on shore to be washed. It does not appear that he had the consent of the proper officers of the vessel to have the articles in question washed on shore, or that they knew of the fact. The libellant was advised that the vessel was to sail, and went on shore without leave, and without notifying any officer of the vessel of his intention, probably expecting to return before the vessel should leave. He was sought for on shore, but could not be found, and the master was obliged to ship another man in his place at Key West, and the vessel left without him, and he subsequently found his way to New York by another vessel. He brought with him the washed articles and restored them to the vessel, and demanded his wages.

For libellant, *A. Nash*.

For defendant, *Beebe, Donohue & Cooke*.

BLATCHFORD, J. I think that the facts all go to show that, though the libellant went on shore without leave,

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The Schooner *Catawanteak*.

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and was left behind, he had no intention of deserting the vessel, and did not desert her in any such sense as to make him incur a forfeiture of his wages under the twenty-fifth section of the Act of August 18th, 1856 (11 *U. S. Stat. at Large*, 62). Nor, if he did desert, was the desertion noted on the list of the crew and officially authenticated, as required by that Act, so as to make the forfeiture of wages operative.

The particular defence set up in the answer is, that the libellant left the vessel without permission, and remained away for the space of more than forty-eight hours, and that an entry of this was duly made in the log-book of the vessel on the day on which he absented himself, and that he thereby forfeited his wages. The forfeiture thus set up is claimed under the fifth section of the Act of July 20th, 1790 (1 *U. S. Stat. at Large*, 133). But the defence is not made out. The statute must be strictly complied with, in order to make the forfeiture operative. The entry in the log-book must state the fact and date of absence, and the name of the seaman, and must show that his absence was without leave. The entry in the log-book, in this case, does not state the name of the seaman, or the fact that he was absent without leave.

The libellant is entitled to a decree for his wages, at thirty dollars per month, from the time his service on board commenced, until the 31st of October, 1867, less the payments and credits thereon to which the vessel is entitled. It is impossible for me to decide, from the evidence, what such payments and credits are, and, unless the parties agree, there must be a reference to a commissioner to ascertain them.

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The Steamboat St. John.

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MARCH, 1868.

## THE STEAMBOAT ST. JOHN.

## COLLISION IN THE HUDSON RIVER.—WHISTLES.—LOOKOUT.

Where a steamboat coming down the Hudson River from Albany, on rounding Magazine Point, saw the lights of a towboat below, which was going up on the east side of the river, and the pilot of the steamboat blew two whistles, whereupon the towboat answered with two whistles and starboarded her wheel, expecting that the steamboat would pass to the eastward of her, but the latter struck a barge on the port side of the towboat, the collision occurring about the middle of the river, and the steamboat having no lookout forward outside of the pilot house:

*Held*, That the towboat was right, on hearing the two whistles of the steamboat, in starboarding her helm, and was not in fault.

That the pilot of the steamboat misjudged the position of the towboat, supposing she was on the west shore, instead of on the east shore, and that such mistake was the cause of the collision.

That the steamboat was also in fault, in not having a proper lookout.

BLATCHFORD, J. This is a libel filed by Abraham E. Hasbrouck, owner of the barge Ulster County, for a collision which took place on the Hudson River, near West Point, about 3 o'clock in the morning of the 20th of November, 1864, between the steamboat St. John and the barge. The St. John was on a trip from Albany to New York, having left Albany about eight o'clock on the previous evening, and run to the place of collision, a distance of about one hundred miles, in seven hours, at a speed of over fourteen miles an hour. The Ulster County was in tow of a propeller called the Pluto, and was lashed to the port side of the propeller, there being another barge lashed to the starboard side of the propeller, and a canal boat in tow astern of the latter barge. The Pluto and her tows had left New York, bound to New Paltz, in Ulster County, opposite Poughkeepsie, about five o'clock on the previous afternoon, and had run to the place of collision, a distance of about fifty miles, in ten hours, at

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The Steamboat St. John.

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a speed of about five miles an hour. The night was light, the weather was clear, the tide was about half flood, and there was scarcely any wind. The propeller, with her tows, went up on the east side of the channel of the river, in the usual and proper course for such vessels, until she reached a point nearly opposite West Point, but a little below it. The river runs from Albany southward, and, just above West Point, it turns abruptly to the eastward, around a point called Magazine Point, and, after running in an easterly direction for a short distance, it turns abruptly to the southward around West Point, Magazine Point being on the left bank of the river and West Point on the right bank. The pilot in charge of the Pluto was on the lookout for the St. John, her regular time for leaving Albany being known. The Pluto was going very slowly, being close shut off. As the St. John came down and turned around Magazine Point, and headed to the eastward, the pilot of the Pluto saw her. If the Pluto had kept on the course she was then on, the St. John would have passed to the westward of her and her tows, and there would have been no collision, for the Pluto was well to the east side of the river; and, although the usual course of the St. John was to take rather a wide sweep around West Point, because she was a large boat, in order to get a proper turn and not collide with small vessels along the western shore below West Point, yet she would usually go down in the middle of the river after she had got her turn around West Point. The pilot of the St. John, as soon as she came around Magazine Point and headed to the eastward, saw the light of the Pluto, and sounded two whistles for the Pluto to keep to the left. The pilot of the Pluto immediately replied by two whistles, and starboarded his helm, and got his head to north-northwest, running to the left, and expecting that the St. John would pass to the eastward of him, as indicated by her two whistles. But the St. John came on, and her stem struck the Ulster County on her port

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The Steamboat St. John.

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bow and sunk her. The force of the blow was such as to part all the lashings which fastened the barge to the tug, and, although the St. John had slowed and stopped her engine, and reversed it, before she struck the barge, yet she had on sufficient headway, with the enormous bulk of a steamer over four hundred feet long, which had been running at a speed of nearly fifteen miles an hour but a short interval before, to cut into the barge a distance of some ten feet. It is claimed, on the part of the St. John, that no answering whistles from the Pluto were heard on board of the St. John, and that, in consequence, after slowing, she blew two whistles a second time, and, getting no response to them, stopped her engine and reversed it. But the evidence is satisfactory that the Pluto did answer promptly by two whistles, and did starboard her helm, and it does not appear that the St. John took any different course after she blew her first two whistles from what she would have taken if she had heard a response to them, or that her movements or courses were at all influenced by her failure to hear a response from the Pluto. The St. John kept on without reference to where the Pluto was or the course she was taking, and ran into her. It is very clear, on the evidence, how and why the collision happened. When the pilot of the St. John sighted the light of the Pluto across the land of West Point, he entirely mistook her position. He admits that he thought she was over to the west shore. So believing, he signaled to her to keep toward the west shore, and that the St. John would go to the eastward of her. The Pluto obeyed, and headed accordingly, and had got over to the middle of the river, in her progress from the easterly side of it toward the westward, when the collision occurred. All the testimony agrees that the collision happened at nearly the middle of the river, and the witnesses from the St. John admit that they found the Pluto further to the eastward than they supposed she would be. It is manifest that the

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The Steamboat St. John.

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sole cause of the collision was the mistaking by the St. John of the position of the Pluto and her tows, and the mistaken signal which the St. John gave for the Pluto to keep to the westward, which signal, in the position the Pluto was in, was properly answered by the starboarding of her helm. The St. John was wholly in fault, and the Pluto and the Ulster County were free from fault. The Pluto, as soon as a collision appeared inevitable, slowed and stopped, and used all proper means to avoid it.

The St. John had no proper lookout. The only persons on the lookout on board of her were those in the pilot house, and they mistook the position of the Pluto. It has been again and again decided that the pilot house is not a proper station for a lookout, and this case adds another forcible illustration of the propriety of the well-established rule. If a proper, experienced, and competent lookout had been stationed on the bow of the St. John, engaged in that duty alone, with his attention not distracted by other duties, the presumption is that he would have correctly discerned the position of the Pluto, and that the collision would not have occurred.

There must be a decree condemning the St. John in damages, with a reference to a commissioner, to ascertain and report them.

*Beebe, Dean & Donohue, and C. Swan* for the libellant.

*Charles Jones*, for the claimants.

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In the Matter of James Black and William Secor, Involuntary Bankrupts.

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MARCH, 1868.

## IN THE MATTER OF JAMES BLACK AND WILLIAM SECOR, INVOLUNTARY BANKRUPTS.

INSOLVENCY.—INTENT TO GIVE PREFERENCE.—SUFFERING PROPERTY TO BE TAKEN.—ORDINARY COURSE OF BUSINESS.—ACTION BY ASSIGNEE.

Where a firm, which owed debts which it was not able to pay, owed money to the brother of one of the partners, which they were desirous of securing to him, and the two brothers consulted a lawyer as to how that could be done, who declined to advise them both, but sent away the partner, and then, in behalf of the creditor, brought suit against the firm to recover the debt, the summons being served on the creditor's brother alone, on which service judgment was entered by default against the firm, and execution was issued to the sheriff, who levied on the firm property, whereupon proceedings in involuntary bankruptcy were taken against the firm, and they were adjudged bankrupts without opposition, and, on the application of the judgment-creditor, the sheriff was directed to sell the property and retain the proceeds to abide the order of the court, and proof was ordered to be taken of the facts attending the entry of the judgment, and, on those proofs, the assignee in bankruptcy applied for an order directing the sheriff to pay to him the proceeds of the property in his hands:

*Held*, That, on the facts, the firm was insolvent, and suffered its property to be taken on legal process, with intent to give a preference to the judgment-creditor, and that he had reasonable cause to believe that the firm was insolvent.

That, therefore, under the thirty-ninth section of the Bankruptcy Act, the firm had committed an act of bankruptcy, and the assignee in bankruptcy was entitled to recover back the property so taken.

That the word "insolvency," as used in that section, has a different meaning from the word "bankruptcy," as used in the second section of the Bankruptcy Act of 1841, and means a simple inability to pay, as debts become payable.

That, if the act of a bankrupt does in fact give a preference to a creditor, it is competent to infer an intent on his part to give such preference, unless he prove to the contrary.

That, on the facts, there was, also, a transfer of property to the creditor, in violation of the thirty-fifth section of the Act.

That, as the creditor had submitted himself to the jurisdiction of the court, there was no need of an action by the assignee to recover the property, but the court would order the sheriff to pay over the proceeds to him.



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In the Matter of James Black and William Secor, Involuntary Bankrupts.

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BLATCHFORD, J. The petition, in this case, was one in involuntary bankruptcy, and was filed on the 22d of June, 1867. The acts of bankruptcy alleged in the petition were, that Secor, acting for the firm of Black & Secor, composed of the debtors, procured and suffered the property of the firm to be taken on legal process in favor of Thomas P. Secor, on a judgment entered in the Supreme Court of New York, June 5th, 1867, for \$2,879.78, in favor of Thomas P. Secor, against the debtors, and procured and suffered said judgment to be entered, and an execution to be issued thereon to the sheriff of the city and county of New York, against the property of the debtors, and such property, consisting of goods and chattels, to be taken by the sheriff by virtue thereof; and that Secor procured and suffered said property to be so taken, with intent to give a preference to Thomas P. Secor, as a creditor of the firm, and with intent to defeat and delay the operation of the Bankruptcy Act; and that the debt on which the judgment was entered was not a *bonâ fide* debt; and that the judgment was so procured and suffered with intent to hinder, delay, and defraud the creditors of the firm; and that the firm was wholly insolvent, and had been so for more than a year then last past, and was so at the time of the commission of the alleged acts of bankruptcy. On the 1st of July, 1867, on proof of due personal service on the debtors of a copy of the petition and of an order to show cause, no opposition being made, an order was made by the court adjudging the debtors to be bankrupts, according to Form No. 58.

On the filing of the petition, on the 22d of June, 1867, an order was made by the court, under section forty, that an injunction issue restraining the debtors and all other persons, and especially the sheriff of the city and county of New York, from transferring or disposing of, or interfering with, the property of the debtors. The injunction was issued and served.

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*In the Matter of James Black and William Secor, Involuntary Bankrupts.*

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On the 25th of October, 1867, an order was made by the court, on the application of Thomas P. Secor and of the sheriff, referring it to the register in charge of the case, to take proof of the facts as to whether the bankrupts, or either of them, procured or suffered the judgment referred to to be entered, and execution to be levied, with intent to give a preference to Thomas P. Secor, or any other person, or with intent to defeat the operation of the Bankruptcy Act, and whether Thomas P. Secor, or any person for whose benefit, in whole or in part, the judgment was entered, had reasonable cause to believe that a fraud on the Act was intended, or that the debtors were insolvent, and also whether the judgment, execution, and levy were valid as against the assignee in bankruptcy, and to report the proofs so taken. The order also provided, that the sheriff be permitted to sell the goods levied on by him, and that he hold the net proceeds subject to the further order of this court, to be made on the application either of the assignee or of Thomas P. Secor, on notice to the other party and to the sheriff.

The register has taken the testimony and reported it to the court. The net proceeds of sale in the hands of the sheriff are \$1,957.17, and the assignee in bankruptcy now applies to the court, on the proofs taken before the register, and on notice to Thomas P. Secor and to the sheriff, for an order that the proceeds of sale be paid over to the assignee in bankruptcy.

It appears, from the proofs, that the judgment was obtained against the bankrupts as partners and joint debtors, on service of process on Secor alone. Such service, was made on the 15th of May, 1867, and the judgment was entered by default, on the 5th of June, 1867, which was the earliest day on which it could be entered in due course of law. Black knew nothing of the suit or of the judgment until after the judgment was entered. Thomas P. Secor was represented by counsel on the taking of

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testimony before the register. The witnesses examined were Mr. Townsend (the attorney for Thomas P. Secor in obtaining the judgment), Mr. Dewhurst (a creditor of the firm), and James Black (one of the bankrupts). Neither Thomas P. Secor nor William Secor was examined. The amount of assets of the firm which has come to the hands of the assignee in bankruptcy is less than \$100, the amount of the individual assets of Black which has come to his hands is less than \$500, and no individual assets of Secor have come to his hands.

The testimony shows that, shortly before the suit was brought, Thomas P. Secor and William Secor came together to Mr. Townsend, the attorney; that Thomas then, in the presence of William, said that he had come to consult Mr. Townsend in regard to a claim which he had against Black & Secor, and that it was due, and he wished to get his pay or be secured, and was willing to give time, but felt that he ought to be secured; that Thomas then asked Mr. Townsend how he could be secured, and Mr. Townsend told him there was great difficulty in doing it; that William then told Mr. Townsend that the affairs of the firm were sound, and they would be able to pay their creditors, and said he was willing to secure Thomas in any way it could be done, and that his debt should be paid; that, in reply to an inquiry by both of the parties as to how William could give security, Mr. Townsend told them that he knew of no way in which a security could be given that would be good to Thomas; that Mr. Townsend then told William that he wanted nothing to do with him, and did not wish to advise with him in the matter, and that, if he was to act for Thomas, he could not act for him; that Thomas then said he wanted Mr. Townsend to act for him; that Mr. Townsend then desired William to leave the office, and told him that he could not have anything to do with him or his business; that William withdrew and Thomas remained; that Mr. Townsend then told Thomas that he knew

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of only one course to pursue in the matter, and that was to sue the firm, and to proceed with all diligence in doing it, that he wanted nothing from the firm, but that they would take their own course, and collect the debt, if possible, according to process of law; that Thomas then asked Mr. Townsend what he would advise him to do, and Mr. Townsend told him he would advise him to sue as soon as possible; and that Mr. Townsend then took from Thomas a statement of the claim, and drew the summons and complaint. During the conversation referred to, Thomas suggested that he might have a confession of judgment, and Mr. Townsend told him that he could not. William said, in the conversation, that he was anxious to secure Thomas' debt. William and Thomas are brothers. Throughout the interview, William maintained that the firm could pay everything, if they had time.

The testimony of Black is express to the point, that the firm was insolvent at the time the judgment was obtained and the levy was made, and there appear to have been a series of efforts and propositions in regard to securing Thomas' debt, in which both of the bankrupts and Thomas were engaged, prior to the bringing of the suit, none of which resulted in anything. The plan of bringing the suit was then adopted, under the circumstances detailed, all knowledge of it being kept from Black. The evidence is also entirely satisfactory, that Thomas had reasonable cause to believe the firm to be insolvent at the time the judgment was recovered and the levy was made. Upon the question of insolvency and of Thomas' knowledge of it, the absence of any testimony from either Thomas or William is a very strong circumstance unfavorable to the *bona fides* of the transaction.

The thirty-ninth section of the Bankruptcy Act provides, that, if any person residing within the jurisdiction of the United States, owing debts, provable under the

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Act, exceeding the amount of three hundred dollars, shall, after the passage of the Act, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, make any transfer of property, or procure or suffer his property to be taken on legal process, with intent to give a preference to one or more of his creditors, he shall be deemed to have committed an act of bankruptcy, and, subject to the conditions thereafter prescribed, shall be adjudged a bankrupt. The section then goes on to provide, that, if such person shall be adjudged a bankrupt, the assignee may recover back the property so transferred contrary to the Act, provided the person receiving such conveyance had reasonable cause to believe that the debtor was insolvent. These provisions of the thirty-ninth section, as applied to the facts of the present case, are simply to the effect, that, if William Secor, when the firm of Black & Secor was insolvent, or in contemplation of its insolvency, made a transfer of the property of Black & Secor, or suffered it to be taken on legal process, with intent to give a preference to Thomas P. Secor, as a creditor of the firm, the assignee in bankruptcy of the members of the firm (they having been adjudged bankrupt as such members, and the firm being thus adjudged bankrupt) may recover back the property so transferred contrary to the Act, provided Thomas P. Secor had reasonable cause to believe that the firm was insolvent.

Now, it clearly appears, from the evidence, (1.) That the firm of Black & Secor was insolvent ; (2.) That William Secor, a member of the firm, suffered the property of the firm to be taken on legal process ; (3.) That he did so with intent to give a preference to Thomas P. Secor, as a creditor of the firm ; (4.) That Thomas P. Secor had reasonable cause to believe that the firm was insolvent.

(1.) In regard to the question of *insolvency*, the provisions of the Bankruptcy Act of 1841 were very different from those which are found in the Act of 1867. The second section of the Act of 1841 declared void all transfers

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of property made by the bankrupt *in contemplation of bankruptcy*, and for the purpose of giving a preference to any person over general creditors, and all transfers of property made by the bankrupt *in contemplation of bankruptcy*, to any person not a *bona fide* creditor, or a purchaser for a valuable consideration without notice, and authorized the assignee in bankruptcy to recover the property transferred; but it expressly provided, that all dealings and transactions by and with any bankrupt *bona fide*, made and entered into more than two months before the filing of the petition in bankruptcy, should not be invalidated or affected by the Act, provided that the other party to any such dealings or transactions had no notice of a prior *act of bankruptcy*, or of the intention of the bankrupt to take the benefit of the Act. It was decided by the Supreme Court, in *Buckingham v. McLean* (13 *Howard*, 150, 167), that the words "contemplation of bankruptcy," in the second section of the Act of 1841, did not mean contemplation of insolvency—of a simple inability to pay, as debts should become payable, whereby the business of the debtor would be broken up—but meant that the debtor must have contemplated the commission of what was declared by the Act to be an act of bankruptcy, or must have contemplated an application by himself to be decreed a bankrupt. The view of the court was, that, under the Act of 1841, something more than the insolvency of the debtor was required to render void a security given to a *bona fide* creditor more than two months before the filing of the petition, and notice to the creditor of something more than such insolvency; that the word "bankruptcy," as used in the Act, meant a particular legal *status*, to be ascertained and declared by a judicial decree; that a person might contemplate insolvency and the breaking up of his business, and yet not contemplate bankruptcy; and that, as the contemplation of insolvency was not in fact the contemplation of bankruptcy, the phrase, "contemplation of bankruptcy,"

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did not include the contemplation of mere insolvency. In these particulars, the thirty-ninth section of the Act of 1867 differs widely, and with a manifest purpose, from the Act of 1841. The words of the thirty-ninth section, in defining the act of bankruptcy, are, "bankrupt or insolvent, or in contemplation of bankruptcy or insolvency." If the debtor is in any one of those conditions when he makes the transfer of his property, or procures or suffers his property to be taken on legal process, with intent to give a preference to a creditor, he commits an act of bankruptcy thereby, and is liable therefor to be adjudged a bankrupt; and the assignee may recover back the property so transferred contrary to the Act, provided the person receiving the conveyance had reasonable cause to believe that the debtor was insolvent. The words *insolvent* and *insolvency*, as used in the thirty-ninth section and elsewhere in the Act of 1867, are not synonymous with the words *bankrupt* and *bankruptcy*, if the latter words have, in that Act, the meaning which the Supreme Court, in *Buckingham v. McLean*, affixed to them as used in the Act of 1841. The former words, in the view of such meaning of the latter words, mean something different, and something less restricted. The word *insolvency*, as used in the Act of 1867, means what the court, in *Buckingham v. McLean*, held the word *bankruptcy* did not mean, and the word *insolvency* did mean—a simple inability to pay, as debts shall become payable, whereby the business of the debtor will be broken up, without any contemplation of the commission of an act for which he can be put into involuntary bankruptcy, and without any contemplation of an application by himself to be decreed a bankrupt. But, if the words *bankrupt* and *bankruptcy*, as used in the thirty-ninth section of the Act of 1867, do not mean what they meant in the Act of 1841, as interpreted by the Supreme Court in *Buckingham v. McLean*, but mean, in view of the relationship in which they are placed, in that section, to the

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words *insolvent* and *insolvency*—"bankrupt or insolvent, or in contemplation of bankruptcy or insolvency"—the same thing as the words *insolvent* and *insolvency*, they must have the meaning which, in *Buckingham v. McLean*, the Supreme Court discarded as belonging to them, and the meaning which that court in that case assigned to the words *insolvent* and *insolvency*. In either view, the decisions of the courts under the Act of 1841, as to what transfers of property made by a bankrupt before the commencement of proceedings in bankruptcy were void under the second section of that Act, and the decisions of the English courts as to the meaning of the words, "bankrupt" and "contemplation of bankruptcy," have very little, if any, application to the Act of 1867.

(2.) So, also, in regard to the question of *suffering* property to be taken on legal process, the language of the thirty-ninth section is, "procure or suffer his property to be taken on legal process." There was no such language in the Act of 1841. It was, by the first section of that Act, made an act of bankruptcy for a person to willingly or fraudulently *procure* his goods to be taken in execution. The word "suffer," in this connection, was not used in the Act of 1841. There is a clearly recognized legal distinction between *procuring* and *suffering*. The Act of 6 George IV., ch. 16, sec. 3, provided, that, if any trader should *suffer* himself to be arrested for any debt not due, or *suffer* himself to be outlawed, or *procure* himself to be arrested, or his goods, money, or chattels to be attached, sequestered, or taken in execution, he might be brought into bankruptcy. In *Gibson v. King* (1 *Carr. & Marsh.*, 458), a creditor had brought an action against the bankrupt for a debt, and judgment had been suffered to go by default, and an execution had been issued on it, on which the bankrupt's goods had been taken, and the question arose, whether *suffering* the judgment to go by default in the action, and *suffering* the goods to be taken on the execution on the judgment, was *procuring* the



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goods to be taken in execution, within the statute. The court held, that the bankrupt had *suffered* the goods to be taken in execution, but had not *procured* them to be so taken. The same view of the distinction between the two words in the English Act was taken in *Gore v. Lloyd*, (12 *Mee. & W.*, 463). The distinction there maintained by Baron Alderson was, that the bankrupt *procured* his goods to be taken in execution, when the initiation of the proceeding came from him, when he was the person who began to procure, when he caused the thing to be done, in the ordinary sense of the word; but that the signing reluctantly, and under strong pressure from a creditor, of a warrant to confess a judgment, under a stipulation that the warrant should not be unnecessarily put in force, was *suffering*, and not *procuring*, goods to be taken in execution, which were taken on an execution issued on a judgment entered up on the warrant. The English and other decisions as to pressure by a creditor, and as to what it is to *procure*, have no application to the question of *suffering* (*Denny v. Dana*, 2 *Cushing*, 160, 170).

(3.) As to the question of *intent* on the part of the debtor to give a preference to the creditor. The intent to prefer is essential; but every person is to be presumed to intend the natural and probable consequences of his own acts, and, if such acts do, in fact, give a preference, it is competent to infer the intent (*Denny v. Dana*, 2 *Cushing*, 160, 172; *Beals v. Clark*, 13 *Gray*, 18, 21).

Where the act which is made the act of bankruptcy is a passive act, such as that of suffering property to be taken on legal process, when the debtor is insolvent or in contemplation of insolvency, with intent to give a preference to a creditor, if the natural and probable consequence of the act of sufferance is to give the preference to the creditor, it will be inferred that the debtor had such intent, unless he shows the contrary; and the burden will be upon him to show the contrary. In the

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present case, the act of suffering Thomas P. Secor, the creditor, to obtain his judgment, and take the property of the firm on legal process thereunder, could have no other effect, if not thwarted, than to give to Thomas P. Secor a preference, as such creditor, over other creditors of the firm, and, therefore, William Secor would be held to have intended to give such preference. But, in addition to that, the evidence is such as to show affirmatively that he intended that his suffering the judgment to be recovered should effect the preference. He could have prevented the preference, by filing his voluntary petition in bankruptcy, for an adjudication of bankruptcy against the firm, and bringing in his copartner. Being able to prevent the preference, he must, not having prevented it, be held to have suffered it, within the meaning of the Act.

(4.) As to the question whether Thomas P. Secor had reasonable cause to believe that the firm was insolvent, the evidence leaves no fair ground for doubt on the subject.

The same results that follow from the application of the provisions of the thirty-ninth section of the Act to this case, follow also under the thirty-fifth section. The two sections are *in pari materia*, and must be construed together. There is, however, no conflict between them, and they are of the same purport and tenor. Under the thirty-fifth section, if William Secor, his firm being insolvent, did, within four months before the filing of the petition against his firm, make any transfer of any part of the property of the firm to Thomas P. Secor, he being a creditor of the firm, with a view to give a preference to him, and if Thomas P. Secor, being the person receiving the transfer, or to be benefited by it, had reasonable cause to believe the firm to be insolvent, and that the transfer was made in fraud of the provisions of the Act, the transfer was void, and the assignee may recover the property, or its value, from Thomas P. Secor. The thirty-fifth section also

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provides, that, if the transfer was not made in the usual, or ordinary, course of business of the debtor, the fact shall be *prima facie* evidence of fraud. The act of suffering the creditor to take the property of the firm on legal process, the firm being insolvent, when such taking could have been prevented by an application in voluntary bankruptcy, was a fraud on the provisions of the Act, and was a transfer of the property of the firm to the creditor, within the meaning of the thirty-fifth section, and must be held to have been a transfer made by the debtors, and with a view to give a preference to the creditor. The creditor was to be benefited by the transfer, and had reasonable cause to believe the firm to be insolvent, and that the transfer was made in fraud of the provisions of the Act. The transfer was not made in the usual, or ordinary, course of business of the debtors. Therefore, it was void, and the assignee in bankruptcy is entitled to recover from Thomas P. Secor the property transferred, or its value. There is no need of a new action for such purpose. Thomas P. Secor has submitted himself to the jurisdiction of this court in the premises. It was on his application that the order was made, referring the matter to take testimony as to the facts involved, and directing the proceeds of the property transferred to be held by the sheriff, subject to the further order of this court, to be made on the application of either party, on notice to the other.

The Act of 1867 is much more extensive and far-reaching, in its provisions respecting transactions by a debtor with his creditors, than the Act of 1841 was. In respect to the Act of 1841, the Supreme Court, in *Shawhan v. Wherritt* (7 *Howard*, 627, 644), said: "The policy and aim of bankrupt laws are, to compel an equal distribution of the assets of the bankrupt among all his creditors. Hence, when a merchant or trader, by any of these tests of insolvency," that is, the acts which are made, by the statute, acts of bankruptcy, "has shown his inability to

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meet his engagements, one creditor cannot, by collusion with him, or by a race of diligence, obtain a preference, to the injury of others. Such conduct is considered a fraud on the Act, whose aim is to divide the assets equally, and, therefore, equitably." These doctrines, thus held to be applicable to the Act of 1841, are much more applicable to the Act of 1867. And Congress, in view of the provisions of the Act of 1841, and of the decisions of the Supreme Court under it, in regard to the meaning of the words "bankruptcy" and "contemplation of bankruptcy," and of the decisions of the courts in the United States and in England in regard to the meaning of the words *procure* and *suffer*, and in regard to the effect of pressure or suit by a creditor upon the question as to whether the debtor procures to be done the act which secures the preference to the creditor, must be regarded as having intended, by the use of the words *insolvent*, and *contemplation of insolvency*, and *suffer*, in the connection in which they are found in the Act of 1867, to strike at the root of all preferences obtained by a creditor, where his debtor is insolvent, or in contemplation of insolvency, by the taking of the debtor's property on legal process, whether the taking be by an act of procurement, or an act of sufferance, on the part of the debtor, where there is an intent on the part of the debtor to give such preference, and the creditor has reasonable cause to believe that the debtor is insolvent.

An order must be entered, that the sheriff pay over to the assignee in bankruptcy the net proceeds of the sale of the property in question.

*Charles H. Smith*, for the assignee in bankruptcy.

*H. P. Townsend*, for Thomas P. Secor.

*Brown, Hall & Vanderpoel*, for the sheriff.

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In the Matter of William Griffen, a Bankrupt.

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MARCH, 1868.

IN THE MATTER OF WILLIAM GRIFFEN, A  
BANKRUPT.

## WITNESS FEES.—BANKRUPT'S WIFE.

The wife of a bankrupt, attending under an order, and being examined as a witness, is entitled to witness and travel fees, calculated according to the third section of the fee bill Act of February 26th, 1853.

If a witness in bankruptcy proceedings is, by the adjournments of the examination, obliged to attend at intervals, and it is reasonable for him to return home during the intervals, he is entitled to travel fees, at five cents a mile, for going and returning each time, and to \$1.50 for each day's attendance.

The fees of a witness must be paid or tendered at the time of the service of the summons or subpoena.

If there is an adjournment, he is entitled to be paid his attendance fee for the adjourned day, and travel fees, if it is reasonable for him to return home, of which the register is to judge.

If the fees are not paid and the witness attends, the fees are to be collected as in ordinary actions.

In this case, the wife of the bankrupt had attended, in obedience to an order, to be examined as a witness. The examination was adjourned several times, the witness going home (14 miles) between the adjournments. The question of the fees to which she was entitled, and as to how their payment could be enforced, was certified by the register to the court.

BLATCHFORD, J. 1. The wife of the bankrupt is entitled to witness fees for attendance and travel, the same as any other witness.

2. Such fees are to be those prescribed for witnesses by the third section of the fee bill Act of February 26th, 1853. General Order No. 29 provides that the fees of witnesses shall include their traveling expenses to and from the place at which they may be summoned

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In the Matter of Curtis Judson, a Bankrupt.

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to attend. This means no more than the traveling fees allowed by the Act of 1853. But, if the witness was, by adjournments of the examination, obliged to attend at intervals, and it was reasonable for her, during the intervals, to return to her residence, she is entitled to traveling fees, at five cents per mile, for going and returning, as often as she went and returned, and to \$1.50 for each day's attendance before the register.

3. By General Order No. 29, the fees of a witness must be tendered or paid to him at the time of the service of the summons or subpoena. The fees, so to be tendered or paid at the time of such service, are the fees for going and returning once and for one day's attendance. If there be an adjournment, the witness must be paid for another day's attendance, before he is bound to attend on the adjourned day ; and, if it is reasonable for him to return to his residence, to be judged of by the register, he is entitled to be paid his travel fees for going and returning a second time, before he is bound to come a second time. If the fees are not so paid, and the witness nevertheless attends, the payment of the fees is to be enforced as in ordinary actions and according to the practice of the court therein.

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MARCH, 1868.

IN THE MATTER OF CURTIS JUDSON, A BANK-  
RUPT.

BANKRUPT'S EXAMINATION.

A bankrupt under examination as a witness, has no absolute right to consult with his counsel respecting the answer to be made to a question propounded to him, and to put in, as such answer, an answer prepared by such counsel, as the result of such consultation ; but he may advise with his counsel concerning his answers when the register can see cause therefor.

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In the Matter of Curtis Judson, a Bankrupt.

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In this case, the register certified to the court the question whether the bankrupt, while under examination, had the absolute right to consult with counsel respecting the answer to be made to a question propounded to him, and to put in, as such answer, an answer prepared by such counsel, as the result of such consultation. The register referred to the case of Tanner, decided by Judge Lowell, in the District Court for the district of Massachusetts.

BLATCHFORD, J. I have carefully examined the decision of Judge Lowell, in the case of Tanner (1 *Bankrupt Register*, 55), and concur fully in his views, in all respects, as there expressed.\*

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\* UNITED STATES DISTRICT COURT, MASSACHUSETTS.

IN THE MATTER OF EDWARD P. TANNER, A BANKRUPT.

LOWELL, J. The register, by agreement of the parties, has certified the question whether a bankrupt, upon his examination, under section twenty-six, has a right to answer by the mouth of his attorney. The law, at section twenty-six, provides for an examination of the bankrupt in writing, as to all matters concerning his trade, dealings, debts, property, &c. It is plain, upon the whole tenor of the section, that the examination may be had before the court or before a register, and that the debtor is to be personally present, and to make answer substantially like a witness, and not merely to have interrogatories filed or propounded after the manner adopted in equity and admiralty in certain cases. Whether the requirement that it shall be in writing means that the questions shall always be in writing, if required by either party, I do not now decide, but I do not think it is intended that the bankrupt himself or his attorney shall write the answers, but merely that the deposition shall be reduced to writing and signed by the bankrupt.

Since the examination may extend to the bankrupt's whole business life, and may involve large interests of himself and his family, and of other persons who have dealt with him, he should have every proper facility for refreshing his recollection and for making true and careful answers. He may need to consult books and papers, and sometimes, no doubt, to consult counsel, but it seems to me impossible to lay down any general or peremptory rule of law governing such consultations.

In an early case under the insolvent law of Massachusetts, the Supreme Judicial court is said to have held that the insolvent is absolutely entitled to this privilege. The case is very briefly reported, and without reasons given, but it has been accepted and acted upon ever since (*Ex parte Winsor*, 8 *Law Reporter*, 514).

MARCH, 1866.

## THE STEAMSHIP WESTERN METROPOLIS.

## SEAMAN'S WAGES.—PLEADING.—PAYMENT.

Where a libel was filed for seaman's wages, and the answer set up that the libellant had been paid in full before suit brought, and had released the vessel and her master and owners from all claim by a release under seal, and the libellant excepted to the answer because the date of the release was not set forth, nor the time when it was made, nor the consideration for which it was given:

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The practice which has followed this adjudication has been, as I believe the bar will generally concede, unfavorable to the ascertainment of the truth in these investigations, by reason of the great labor and delay of proceeding in that mode, and there is some reason to believe that if the question were new, the same court might now decide it differently; for in *Peabody v. Harmon* (3 *Gray*, 113), they refused this privilege to a creditor under examination in support of his debt, and many of the reasons for the decision apply with great force to all examinations; and the rule there laid down, that such matters must be left to the judgment of the examining magistrate, appears to me to be of general application. It is not to be supposed that a register will deny the bankrupt or a witness such reasonable opportunity to see his books and papers, and to consult concerning his rights, as will enable him to answer understandingly, and with all proper reservations, the questions that may be asked him. In England, Lord Chancellor Hardwicke refused to make a peremptory order in a similar case, but recommended that the petitioner (a woman) should be allowed the privilege (*Ex parte Parsons*, 1 *Atk.* 204, and see *Ex parte Bland*, *Id.* 205); and such appears to have remained the rule of practice there (1 *Christian's Bankruptcy Law*, 385; 1 *Mont. & Ayrt. B. L.* 385, 2d Ed.) I do not say that on a motion to commit for not answering, or in some other mode, the judgment of the register might not, in some cases, be reviewed; but that there is no general rule of law to be laid down upon the subject, and that, as a matter of practice, it is highly inconvenient that one should be adopted which should tend to mischievous delay without any corresponding advantage. The questions to a bankrupt are usually concerning matters of fact, and, in the vast majority of cases, involve nothing requiring advice or consultation; and the presence of counsel, with the right to object to improper questions, and to uphold the rights of the bankrupt in substantially the same manner that he would do if his client were called on the stand as a witness in his own cause in any other court, and with the further reserved right to advise with him concerning his answers when the register can see cause therefor, meets, as it seems to me, all the requirements of justice in this regard.



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The Steamship Western Metropolis.

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*Held*, That the defence was payment, and the release was only evidence of it, and it was not necessary to state its date or consideration, or when it was given.

BLATCHFORD, J. This is a hearing on exceptions to an answer. The libel is for seaman's wages. The answer sets up, that the libellant had, prior to the filing of the libel, been paid in full for all services rendered by him as seaman on the vessel, and, by a release, under seal, released the vessel and her master and owners from all claim and demand. The answer is excepted to because the date of the release is not given, or the time stated when it was made, or the consideration for which it was given. The claim in the libel is wholly for services rendered by the libellant as seaman on the vessel. The answer sets up, in proper form, payment in full to the libellant therefor, before the filing of the libel. The release is merely evidence of the payment, and is as good to that end, whether it was given at one time or another, or whether it bears one date or another. It was not necessary to state its date, or when it was given, or its consideration. On the trial, the claimants will be held to prove the payment as and when alleged. The release will not be conclusive evidence of such payment. The question which the proctor for the libellant seems to desire to raise, as to a settlement having been made in fraud of the rights of such proctor, cannot be raised by exception to this answer. His rights, if they have been violated, will be protected on the trial. The exceptions are overruled, but without costs.

*A. Nash*, for the libellant.

*J. K. Hill*, for claimants.

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In the Matter of Asa W. Craft, an Involuntary Bankrupt.

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MARCH, 1868.

IN THE MATTER OF ASA W. CRAFT, AN INVOLUNTARY BANKRUPT.

CONFESSION OF JUDGMENT.—SUFFERING PROPERTY TO BE TAKEN.—  
CONTEMPLATION OF BANKRUPTCY.—INSOLVENCY.—AMENDMENT.

Where a petition in involuntary bankruptcy alleged that the debtor had, "in contemplation of bankruptcy," given a confession of judgment to one of his creditors, on which execution had been issued and his property taken, and that this was done with intent to give a preference to the creditor, and, on the proofs, it appeared that the confession of judgment was given, and the property levied on under execution and sold, and that the debtor was insolvent at the time, but did not contemplate bankruptcy, or know that there was such a law as the Bankruptcy law:

*Held*, That the facts made out a case against the debtor, under the thirty-ninth section of the Bankruptcy Act, of suffering his property to be taken on legal process, with intent to give a preference to the creditor in question, the debtor being at the time insolvent.

That there are four species of acts for which, when done by a person bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, with intent to give a preference to one or more of his creditors, he may be put into bankruptcy, viz.: (1.) Making a transfer of his property; (2.) Giving a warrant to confess judgment; (3.) Procuring his property to be taken on legal process; and (4.) Suffering his property to be taken on legal process. The first three require affirmative action on the part of the debtor, but the last does not.

That the act of the debtor in this case was not done in contemplation of bankruptcy.

That, as the petition did not allege that the act was done when the debtor was insolvent, an adjudication could not be made upon it as it stood, but, inasmuch as the fact that he was insolvent appeared, and there was no surprise on the debtor, the case was a proper one for an amendment of the petition in that particular.\*

BLATCHFORD, J. In this case a petition was filed by Hoyt, Carter & Co., August 28th, 1867, praying

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\* This decision, as to the propriety of the amendment in this case, was affirmed by the Circuit Court (*In re Craft*, 2 *Bankrupt Register*, 44).

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In the Matter of Asa W. Craft, an Involuntary Bankrupt.

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that Craft be declared a bankrupt. The petition sets forth, as alleged acts of bankruptcy, that Craft "did, in contemplation of bankruptcy, give to one Samuel Jones, one of his creditors, on the 3d day of July, 1867, a confession of judgment, and, on said day, caused a judgment to be entered thereon, for the sum of \$7,088, and, on said day, an execution issued thereon, to the sheriff of the city and county of New York ;" also, that Craft "did, in contemplation of bankruptcy, give to one Lewis Van Doren, one of his creditors, on the 17th day of August, 1867, a confession of judgment, and, on said day, caused a judgment to be entered thereon for the sum of \$548.77, and, on said day, an execution issued thereon to the sheriff of the city and county of New York ; that said confessions of judgment, and each of them, were given by said Craft to said creditors, with the intent to give a preference to the said Samuel Jones and Lewis Van Doren, two of the creditors of said Asa W. Craft, and with the intent to defeat or delay the operation of the " Bankruptcy Act ; "that the sheriff of the city and county of New York, under and by virtue of said executions, levied on and took the property of the said Asa W. Craft, and has sold the said property to pay and satisfy the said executions in favor of said Jones and Van Doren ;" and "that the proceeds of the sale of said property amounted to over the sum of \$5,100, which has been paid out by said sheriff to said Samuel Jones, in part satisfaction of said judgment of said Jones against said Asa W. Craft."

On the return of the order to show cause on the petition, the debtor denied the acts of bankruptcy set forth in the petition, and demanded a trial by the court, and thereupon an order was made, under section thirty-eight of the Act, referring it to a commissioner of the Circuit Court to take and certify to the court all such evidence and testimony as should be offered before him on the part of the creditors or debtor in the matter, upon the

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In the Matter of Asa W. Craft, an Involuntary Bankrupt.

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issues raised by the petition and denial. The commissioner has taken and reported the testimony, and the case has been argued thereon by the counsel for the respective parties.

The testimony consists mainly of copies of the confessions of judgment named in the petition, and of the depositions of the deputy sheriff, who levied on the property of the debtor and sold it under the Jones judgment, of the attorney for Jones, who procured the Jones judgment to be confessed, of Craft, the debtor, and of Jones, the creditor.

The confession of judgment in the Jones case is in the usual form, under the laws of New York, of a statement signed and sworn to by Craft, July 3d, 1867, setting forth the consideration of his debt to Jones, and its amount, \$7,083, and confessing judgment in favor of Jones for that amount. On this a judgment was entered up on the same day for that amount, and \$5 costs, in all \$7,088, in the Supreme Court of New York. On the same day, an execution was issued on the judgment to the sheriff of the city and county of New York, on which he levied on sundry personal property of Craft's, which he afterward sold on the execution. The net proceeds of the sale amounted to \$4,517.64, and were applied on the execution. The sheriff could find no other property of Craft's on which to levy, to make the balance of the Jones execution, or to make anything on an execution which was issued to him on the Van Doren judgment. The testimony is full to show that Craft was deeply insolvent when he confessed the Jones judgment, and, that, after the sale of his property under the Jones execution, he had no property whatever with which to pay his debts. The confession of the Jones judgment was made by Craft under pressure from Jones, the debt having been one of long standing, and frequent demands for payment of it having been made by Jones, and legal proceedings on it being threatened by Jones, and he also

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threatening to foreclose a chattel mortgage which he held on some of Craft's property. The proposal to confess the judgment did not emanate from Craft, but from Jones. Nothing was said between the parties about bankruptcy. Craft did not contemplate bankruptcy, and did not know there was such a law as the bankruptcy law. The debt to Jones was in all respects *bona fide* and fully due.

These facts make out a case fully within section thirty-nine of the Act. Craft, being insolvent, suffered his property to be taken on legal process, with intent to give a preference to Jones, as a creditor. He could have prevented the taking of his property on legal process by going into voluntary bankruptcy; and, being insolvent, it was his duty to do so. By not doing so, and by confessing judgment to Jones, and allowing Jones to take his property on the execution issued on the judgment, Craft suffered his property to be taken on legal process. The result of this was to give a preference to Jones. The presumption of law is, that Craft intended to effect this result. It is for him to rebut that presumption. He has not done so. On the contrary, all the circumstances of the case corroborate it.

The views of this court as to the proper interpretation to be given to the thirty-ninth section of the Act, in a case of this kind, have been fully stated in its decision in the recent case of Black and Secor (*Ante*, p. 196). The doctrine, strongly urged on the part of the debtor in this case, on the authority of the cases of *Ogden v. Jackson* (1 *Johns.*, 370), *Locke v. Winning* (3 *Mass.*, 325), and *Phoenix v. The Assignees of Ingraham* (5 *Johns.*, 412), has no application to the provisions of the thirty-ninth section of the Act of 1867, which are involved in the present case. It has no application to the case of an insolvent's suffering property to be taken on legal process, with intent to prefer a creditor. Those cases were all of them cases under the Bankruptcy Act of

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In the Matter of Asa W. Craft, an Involuntary Bankrupt.

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1801. That Act required, in order to make an act of bankruptcy, that the person should, with intent unlawfully to delay or defraud his or her creditors, willingly or fraudulently procure his goods, money, or chattels to be taken in execution. It did not require that the person should be bankrupt or insolvent, or should do the act in contemplation of bankruptcy or insolvency; and it required that there should be a *procuring* by the debtor, and not merely a *suffering*. The Act of 1841 required, to make the act of bankruptcy, that the debtor should willingly or fraudulently procure his goods and chattels to be taken in execution. The Act of 1867 requires that the debtor, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, should procure or suffer his property to be taken on legal process, with intent to give a preference to one or more of his creditors. In *Ogden v. Jackson*, the court held that the debtor contemplated an act of bankruptcy, thus, in effect, holding that the Act of 1801 required that he should contemplate such an act. In *Locke v. Winning*, the court held the same view. Chief Justice Parsons, in that case, says: "Until an act of bankruptcy committed, the bankrupt has the exclusive right to dispose of his effects at his pleasure, so that the disposition be *bona fide* and not fraudulent." This is true; but where the being insolvent, and suffering his property to be taken on legal process, with intent to prefer a creditor, is made the act of bankruptcy on the part of the debtor, there the disposition of the property being, with the attendant circumstances, the act of bankruptcy, he has no right so to dispose of it. In *Phoenix v. The Assignees of Ingraham*, the court held that, though the debtor was insolvent, he did not contemplate bankruptcy, and took the view that, under the Act of 1801, an insolvency was no objection to giving a preference, unless it were shown that a bankruptcy was contemplated at the time, on the ground

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that every man has a right to dispose of his property to whom he pleases, for an adequate consideration, and in satisfaction of his debts, until he commits an act of bankruptcy, or contemplates so to do. The court also held that, even if an act of bankruptcy were contemplated by the debtor, yet if, at the instance and on the application of the creditor, he made payment or assigned property, such payment or assignment was valid. The doctrine of these cases, and of like cases under the Act of 1841, and of English cases on provisions like those in the Acts of 1801 and 1841, is done away with by the express provisions of the thirty-ninth and thirty-fifth sections of the Act of 1867. The cases to which I have referred were cases in reference to the validity of payments and transfers, and the present question concerns the question, what is an act of bankruptcy. But both questions are so interwoven together, in the thirty-ninth and thirty-fifth sections (the committing of an enumerated act of bankruptcy, through a transfer of property by affirmative action, procuration, or sufferance being made a ground for adjudication, as a fraud against the Act, and the transfer being also made void, as being such a fraud), that the views on the one question apply very much to the other. There are, indeed, grounds for adjudication of bankruptcy specified in the Act of 1867 which cannot involve any question of the transfer of property, as, for instance, departure from the State of which the person is an inhabitant, with intent to defraud creditors, and other grounds. But the general remark is true ; and, as the Act of 1867 is so different from the Acts of 1801 and 1841, in the particulars under consideration, the decisions under the latter two Acts, as to the grounds for adjudging a debtor to be a bankrupt, and for setting aside, as void, a previous transfer of property by him, have very little application to the provisions of the Act of 1867 in those particulars.

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It was strongly urged, on the part of the debtor, that the preference must be voluntary, and that, if there is any pressure by the creditor, it is not voluntary. This may be so as respects an affirmative act of transfer, or of procuration. But it is not so in regard to an act of sufferance. The thirty-ninth section defines four species of acts for which, when done by a person bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, with intent to give a preference to one or more of his creditors, he may be put into bankruptcy. They are : (1.) Making a transfer of his property ; (2.) Giving a warrant to confess judgment ; (3.) Procuring his property to be taken on legal process ; (4.) Suffering his property to be taken on legal process. So far as the first, second, and third of these are concerned, the provisions are old, and existed in the former Bankruptcy Acts, and require affirmative voluntary action by the debtor ; and the decisions under the former laws may, perhaps, apply, to the effect that pressure by a creditor deprives the acts of the debtor of their voluntary character. But the Act of 1867 adds the fourth act of bankruptcy—suffering property to be taken on legal process. This was added for a purpose and with an intent. To say that there cannot be a suffering where there is pressure by a creditor, is to destroy the plain meaning of the word. To suffer or permit implies pressure and action from without. Pressure being thus an inherent element of sufferance, to say that where there is pressure there can be no sufferance, is to utter a fallacy. Where a person permits what he can prevent, he suffers or allows the thing to be done, whether he is threatened or pressed or not. A debtor who is threatened or pressed can prevent the taking of his property on legal process by going into voluntary bankruptcy. If he does not, he clearly suffers, or allows, or permits the taking. In *Gore v. Lloyd* (12 *Mee. & W.*, 480), it was held, that giving, under pressure, a warrant of attorney



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to confess a judgment, under which goods were taken on execution, was not procuring, but was suffering the goods to be taken on execution ; and, in *Gibson v. King* (1 *Carr. & Marsh.*, 458), it was held, that allowing a judgment to go by default was suffering goods to be taken in execution which were taken under the judgment, and was not procuring them to be so taken.

With these views, nothing would remain but to decree an adjudication of bankruptcy against Craft, but for the fact that the petition of the creditors is defective in its allegations. It sufficiently avers that Craft suffered his property to be taken on legal process, with intent to give a preference to Jones, as a creditor ; but it nowhere avers that Craft committed this act of sufferance when he was insolvent, or in contemplation of insolvency. The petition does not aver that he is, or was, insolvent, or contemplated insolvency. It merely avers that he did the acts alleged "in contemplation of bankruptcy." Those words, as used in the Bankruptcy Act of 1841, were defined by the Supreme Court, in *Buckingham v. McLean* (13 *Howard*, 150, 167), to mean, in contemplation of committing what was made by the Act an act of bankruptcy, or of voluntarily applying to be decreed a bankrupt. I think they have the same meaning as used in the thirty-ninth section of the Act of 1867. In such sense, Craft did not commit this act of sufferance in contemplation of bankruptcy. It will not do to say that the act of making a transfer of property, or of procuring or suffering property to be taken on legal process, with the intent named, is an act of bankruptcy, whether the debtor is, or is not, otherwise shown to be bankrupt or insolvent, or to be contemplating bankruptcy or insolvency, on the idea that the act becomes, *ipso facto*, one in contemplation of bankruptcy, because, it being an act of bankruptcy, and thus being bankruptcy, the doing of it must have been in contemplation of bankruptcy. This is reasoning in a

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circle, and such a view would not require that the debtor should ever be *insolvent* or contemplate *insolvency*, and would virtually strike those words out of the section; for, if it were shown that the debtor had done the act named, with the intent named, the fact that he had done it in contemplation of bankruptcy would follow as an inevitable legal conclusion, and insolvency, or the contemplation of it, would never become an operative prerequisite. The debtor must be shown, aside from the mere doing of the act named, with the intent named, to have done it when bankrupt or insolvent, or in contemplation of bankruptcy or insolvency. The only averment in this regard, in the petition in this case, being that the acts done were done in contemplation of bankruptcy, and that averment not being sustained by proof that they were done in contemplation of bankruptcy, the petition is not sustained. Yet all the facts set forth in the petition are found to be true, except the fact that the acts therein alleged to have been done were done in contemplation of bankruptcy. The additional fact is also found to be true, that those acts were done when the debtor was insolvent. The facts set forth in the petition, and such additional fact, make out a clear case for adjudging the debtor to be a bankrupt, and to have committed an act of bankruptcy before the filing of the petition. The additional fact is not one that takes the debtor by surprise. He was fully examined, without objection on his part, on the taking of the testimony, as to his debts and property, with a view to showing that he was insolvent at the time the acts set forth in the petition were done. The case, therefore, is a proper one to suspend a decision on the issue joined, and allow the petitioners to apply to amend their petition in the particular suggested. The fact that the creditors pursued the line of testimony indicated, without objection from the debtor, shows either that the parties labored under a misapprehension as to what the petition

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averred, or else were under the belief that the averment of contemplation of bankruptcy was the equivalent of an averment of contemplation of insolvency, and not more restricted. In either view, an amendment of the petition is proper, to prevent a failure of justice.

The decision on the petition and denial is, therefore, suspended to allow the amendment suggested.

*Benedict & Boardman*, for the creditors.

*Edwin James*, for the debtor.

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MARCH, 1868.

**WESLEY EGBERT vs. THE BALTIMORE AND  
OHIO RAILROAD COMPANY.**

**DAMAGES IN COLLISION CASES.—COMMISSIONER'S REPORT.—NET  
FREIGHT.—INTEREST.**

Where, in a collision case, on contradictory evidence, the commissioner to whom it was referred to ascertain the damages, reported a certain amount as the value of the vessel that was lost:

*Held*, That though, if the question were before the court as an original one, the court would be inclined to fix a lower value, yet, as the preponderance of evidence was not palpable, the finding would not be disturbed.

Net freight only is recoverable in such a case, and not gross freight; nor can the freight allowed exceed that which was claimed in the libel.

Interest on the value of the vessel, and on the net freight, from the time of the loss, may be allowed, though it was not claimed as such in the libel.

**BLATCHFORD, J.** This is a hearing on exceptions by the respondents to the report of a commissioner as to the damages recoverable by the libellant on a decree in a case of collision.

1. The commissioner reports the value of the libellant's vessel, which was sunk by the collision and totally lost, at \$14,000. The respondents contend that the

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evidence before the commissioner warrants a value not exceeding \$10,000. The libel claimed \$16,000 as such value. The testimony is very conflicting, and, if the question were before me originally, as a new question, on the written testimony, and I were called on to decide upon it in the first instance, and it did not come up on the finding of a commissioner and an exception to such finding, I should be inclined to hold that the commissioner had allowed too much for the value of the vessel, and that a sum not exceeding \$11,000 or \$12,000 was the proper amount. But I cannot say that the preponderance of testimony against the \$14,000 is such as to warrant me in disturbing the report in this respect. As was said by this Court in *Holmes v. Dodge* (1 *Abbott*, 63): "It is not usual to reverse the judgment passed upon matters of fact by a tribunal or officer having had opportunity for a personal examination of witnesses in each other's presence. A court reviewing the evidence as reproduced upon paper, possesses but imperfectly the means of determining the relative credit of witnesses who stand in conflict as to facts, and it is always safer, when the preponderance is not palpable, to rely upon the discrimination and conclusions made by those who have seen and heard the witnesses face to face, than to attempt to settle that point by weighing the written report of the testimony." That was the case of exceptions to the report of a commissioner. The same views were applied by the Circuit Court for this District in *The Grafton* (1 *Blatchf. C. C. R.*, 173, 178), and in *The Narragansett* (*Id.*, 211, 217). The first exception is, therefore, disallowed.

2. The commissioner allowed \$847.50 as freight, at \$3.75 per ton, on 226 tons of coal which the libellant's vessel was carrying on freight at the time. The libel claims \$625.50 as freight on 226 tons of coal, being a little over \$2.76 per ton. The rate claimed per ton is not stated in the libel. The evidence shows that the \$3.75 was the gross freight to be earned as contracted for.

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The second exception is to the allowance of the \$847.50, "as no freight was claimed, and none was earned, or if any was earned, it was only *pro rata itineris*, and, if freight was earned, the insurance should be collected of the insurance companies." This exception is overruled. What is meant by the expression "no freight was claimed," is perhaps, not perfectly clear. The libel does claim some freight. If the exception means that the libellant did not, after the collision and before suit, claim the freight from the respondents as damages, that is immaterial. He claims it in this suit. The vessel having been in the act of earning freight, the freight which she was in the act of earning, and has lost by the collision, is allowed, as a just measure of compensation (*The Gazelle*, 2 *W. Rob.*, 279 ; *Williamson v. Barrett*, 13 *How.*, 101, 111 ; *The Bark Heroine*, 1 *Ben.* 226). The second exception is disallowed.

3. The third exception is, that, in case the libellant is entitled to any freight, he is entitled to recover only the amount specified in the libel. The libellant is entitled to recover only net freight, and not gross freight. The commissioner has reported gross freight. There must be deducted from the freight the vessel was engaged in earning, the expenses she would have incurred if the voyage had been successfully performed, and which expense would have diminished by so much the gross freight (*The Gazelle*, before cited.) The exception is broad enough to cover this point, as the libellant is entitled to recover only so much for freight as he has claimed therefor in his libel, and the freight, as allowed, being gross freight, and the amount claimed in the libel being less than the gross freight, it may well be that the amount claimed for freight in the libel is the net freight. In no event can the net freight to be allowed exceed the amount claimed for freight in the libel. The third exception is allowed.

4. The commissioner has allowed interest on the value

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The Ferryboat D. S. Gregory and The Steamboat George Washington.

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of the vessel and on the freight from the time of the collision to the date of his report. The fourth exception is, that no interest should be allowed on the freight, and that none is claimed in the libel. The fifth exception is, that interest should only be allowed, if allowed at all, from the time of the commencement of the suit, and that no interest is claimed in the libel. The libel claims no interest either on the value of the vessel or on the freight. I do not think it was necessary to claim interest in the libel. The libel claims to recover the damage stated for the loss incurred at the time of the loss, and the libellant is entitled, on the case made by him, to have the damages awarded to him as of the time of the loss, and to be made whole as of that time. This is done approximately by allowing to him interest on the value of his vessel and of his net freight to be earned, as they stood at the time of the collision ; that is, interest on them from the time of the collision. The fourth and fifth exceptions are disallowed.

*Beebe, Dean & Donohue*, for the libellant.

*F. R. Sherman*, for the respondents.

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MARCH, 1868.

THE FERRYBOAT D. S. GREGORY AND THE  
STEAMBOAT GEORGE WASHINGTON.

**COLLISION IN NEW YORK HARBOR.—STEAM VESSELS CROSSING.—  
SPEED.—KEEPING COURSE.—PASSENGER.—SUNDAY LAW.—DAM-  
AGES.**

A steam ferryboat, crossing the Hudson River, as she approached her slip on the New York side, saw a steamboat coming down the river about two hundred yards out from the piers, and blew one whistle as a signal and ported her wheel, and, as she saw that the other vessel did not change her course, blew another

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single whistle, and kept on with unslackened speed, till she was struck on the port side by the other steamboat;

The steamboat, coming down the river at the rate of twelve miles an hour, saw the ferryboat coming, and blew two whistles, and kept on with unabated speed and without any change of course, although she saw that the ferryboat paid no attention to her signal, until just before the collision, when her engine was stopped ;

A passenger on the ferryboat, on her way to New York to attend divine service (the day being Sunday), was severely injured by the collision :

*Held*, That both vessels were in fault.

That, when each vessel signaled, it was seen by her that there was "risk of collision," within the meaning of the 14th and 16th articles of the rules for avoiding collisions, contained in the Act of April 29th, 1864 (13 *U. S. Stat. at Large*, 60), and it was the duty of each of them to have then slowed and stopped. That, as the vessels were crossing, it was the duty of the steamboat, having the ferryboat on her starboard hand, to keep out of her way, according to the 14th article.

That it was the duty of the ferryboat, under the 14th and 18th articles, to have kept her course, and she was in fault in porting her helm.

That the libellant could recover her damages against both vessels.

That the libellant was not within the provisions of the Sunday law of the State of New York (1 *Rev. Stat.*, part 1, chap. 20, title 8, art. 8, sec. 70).

That if she had been, it would be no defence to her right of recovery.

That, on the evidence, the libellant was entitled to recover the expenses to which she had been put in consequence of the injury, including the value of some care and service which was gratuitously bestowed on her.

That she was also entitled to recover, for the injury, the damages consequent on her not being able to earn so much after it as before, and also compensation for the pain and mental distress suffered by her, but nothing for exemplary or punitive damages.

Decree for libellant for \$10,000, one-half to be paid by each vessel. \*

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\* This decision was affirmed by the Circuit Court, on appeal, in October, 1868, with such modification as is shown by the following decree made in the cause by the Circuit Court: "This cause having been heard, on the pleadings and proofs, on the appeals of the New Jersey Railroad and Transportation Company, the claimants and owners of the steam ferryboat D. S. Gregory, and of William Meyers, Egbert Meyers, Jacob Meyers, and Michael Sherman, claimants and owners of the steamboat George Washington, from the decree of the District Court of the United States for the Southern District of New York, made on the 18th day of March, 1868, and having been argued by the advocates for the respective parties, and due deliberation having been had thereon; it is now ordered, adjudged, and decreed, that the said decree of the said District Court be, and the same is hereby affirmed; and it is further ordered, adjudged, and decreed, that the libellant Ann Cavan recover from the steam ferryboat D. S. Gregory, her engines, tackle, &c., or her said claimants, and the steamboat George Washington,

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On the morning of Sunday, the 16th of September, 1866, the steam ferryboat D. S. Gregory, a vessel belonging to the New Jersey Railroad and Transportation Company, and plying regularly across the Hudson River, as a ferryboat, from a slip at the foot of Montgomery street, in Jersey City, in the State of New Jersey, to a slip at the foot of Desbrosses street, in the city of New York, left her slip on the New Jersey side, about twenty min-

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her engines, tackle, &c., or her said claimants, the sum of ten thousand dollars, the amount of the damages decreed to her by the decree of the said District Court, together with three hundred and ninety-eight dollars and six cents, her costs, as taxed in said District Court, in all amounting to the sum of ten thousand three hundred and ninety-eight dollars and six cents, adjudged to the said libellant by said decree of said District Court; and it is further ordered, adjudged, and decreed, that the said libellant recover of said steam ferryboat D. S. Gregory, her engines, tackle, &c., or of her said claimants, and of the steamboat George Washington, her engines, tackle, &c., or her said claimants, interest on the amount of said damages and costs, so adjudged by said decree of said District Court, from March 18th, 1868, the date of said decree in the said District Court, to the date of the entry of this decree, amounting to the sum of three hundred and ninety-eight dollars and sixty cents, together with the costs on the appeal to this Court, taxed at two hundred and forty-one dollars and thirty cents, for all of which said damages, costs and interest adjudged to said libellant, amounting, in the aggregate, to the sum of eleven thousand and thirty-seven dollars and ninety-six cents, it is hereby adjudged and decreed, that the respective claimants of each vessel shall be held and are responsible to said libellant; and it is further ordered, adjudged, and decreed, that, as between the claimants of the respective vessels, the said amount of damages, interest and costs, and accruing interest and charges, be equally apportioned and paid between and by the said steam ferryboat D. S. Gregory, her engines, tackle, &c., or her said claimants, and the said steamboat George Washington, or her said claimants; and it is further ordered, adjudged, and decreed, that, on the payment by the claimants of either vessel of one-half of the said amount of damages, costs and interest, with accruing interest and charges thereon, the proceedings of the libellant be stayed as to such vessel and her claimants, for the collection of the residue, until the return by the marshal of an execution unsatisfied against the claimants of the other vessel, for the other half part of said amount, or until it shall otherwise appear that the said libellant is unable to enforce or collect the other half part of said amount of damages, costs and interest, with accruing interest and charges, against the claimants of the other vessel, by process from this Court; and any of the parties are to be at liberty to apply to this Court, if occasion shall require, touching the enforcement of the decree."



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utes past 10 o'clock A. M., with the libellant, Ann Cavan, on board, as a passenger, bound for her slip on the New York side. The libellant was on her way to New York to attend church. She took her seat on the right-hand side of the ladies' cabin, in the forward part of the same, toward the end nearest to New York, the ladies' cabin being on the port side of the boat, and the libellant's face being to the northward, and her right side to the eastward. Her back was thus toward the solid partition which separated the ladies' cabin from the portion of the boat occupied by wheeled vehicles. When the D. S. Gregory had reached a point within about two hundred yards of the entrance to her slip on the New York side, and was off pier 39, which forms the lower side of the slip, a collision occurred between her and the steamboat George Washington. The stem of the George Washington struck the port side of the D. S. Gregory about ten feet from what was then the easterly end of the ladies' cabin, and nearly opposite where the libellant sat, with such force as to go entirely through the width of the cabin, up to and through the partition before mentioned, and nearly up to the body of the vessel below, the cabin being built up upon the guard. The libellant was driven by the blow through the partition and thrown upon the deck, and buried under the wreck of crushed timbers and planks. She was very much bruised and cut, her right leg was broken in three several places, and her left leg was broken in one place. The libel alleged that the collision was caused by negligence and want of skill on the part of each vessel, and by their joint negligence and fault, and averred that each was in fault in not stopping and backing in season, after it became apparent that there was risk of collision from continuing on their respective courses, or in not keeping a good lookout, or other fault or mismanagement, and claimed damages from both vessels, or from either, to the amount of \$10,000.

The answer of the D. S. Gregory was, in substance,

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that, after she left her slip at Jersey City, she proceeded in a northeasterly direction, on her accustomed route, toward her New York slip; that, while on her passage, her pilot discovered the George Washington approaching and coming down the river in a southerly course, the George Washington then being about six hundred yards off; that, when the D. S. Gregory was about five hundred yards off from the George Washington, and about the same distance from the New York slip, the pilot of the D. S. Gregory gave, as a signal, one short distinct blast of the steam whistle, indicating his intention to port his helm and pass to the right of the George Washington; that, at the same time he gave the signal, he ported his helm, with the expectation that the George Washington would port her helm and pass to the right of the D. S. Gregory, in accordance with the signal long established by the laws of navigation; that said signal was loud and distinct, sufficient to be heard on board of the George Washington, but the pilot of the George Washington entirely disregarded said signal, and continued his course in the same direction and at the same rate of speed, which was about twelve miles an hour; that thereafter, and when the George Washington had approached to within about three hundred yards of the D. S. Gregory, said signal of one short distinct blast of the steam whistle was again given, and again disregarded by the George Washington; that thereupon the D. S. Gregory stopped her engine, her speed being then about seven miles an hour; that the George Washington, in total disregard of the signals so given by the D. S. Gregory, continued her course without the slightest perceptible deviation, approaching the D. S. Gregory, the latter having, by means of porting her helm, changed her course more eastwardly; that the George Washington did not change her course at all, and did not stop her engine or moderate her speed until within fifteen or twenty yards of the D. S. Gregory, and then, with her speed but little, if any,

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diminished, ran violently into the D. S. Gregory, at right angles.

The George Washington was an excursion boat, and was, at the time of the collision, bound from the dock at the foot of Christopher street, New York, to the dock at the foot of Barclay street, New York, and thence on an excursion down the bay. The answer of the George Washington averred that she was going down in the usual track; that the D. S. Gregory would, in the usual course of things, have passed under her stern, but that, in consequence of the incompetence and want of skill of those on the D. S. Gregory, they approached the George Washington, and the latter blew two blasts, which indicated that she was going ahead of the D. S. Gregory; and that, finding that no attention was paid to such notice, and that the D. S. Gregory was attempting to pass ahead of the George Washington, the latter stopped and backed, but the collision could not be avoided.

For libellant, *C. Van Santvoord* and *T. M. Adams*.

For the D. S. Gregory, *S. Webster* and *J. C. Jackson*.

For the George Washington, *Beebe, Dean & Donohue*.

BLATCHFORD, J. This collision occurred in open day, and in clear weather, and when there was nothing to interfere with the power of vision or the capacity of manœuvring on the part of either boat. The first fault was on the part of the George Washington. The testimony is, that, after she had left the dock at Christopher street, which was at pier 50, and was on her way down, at a speed of about twelve miles an hour, and at a distance out from the ends of the piers of about two hundred yards, and had reached a point about off the foot of Spring and Canal streets, between piers 42 and 43, she blew a signal of two blasts of her steam whistle. This

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signal was intended to indicate to some other and approaching vessel that the George Washington designed and intended to pass to her own left, and that such approaching vessel must pass to her own left. The approaching vessel was the D. S. Gregory. She was at no great distance. Her place of destination, the slip at the foot of Desbrosses street, between piers 39 and 40, was well known to the George Washington. The George Washington was above the entrance to such slip, and was on a course that would necessarily cross the course of the D. S. Gregory, and the D. S. Gregory was below the entrance to such slip, and was on a course that would necessarily cross the course of the George Washington, because the D. S. Gregory was proceeding from a starting point west of the course of the George Washington, to a point of destination east of such course. The signal by the George Washington was given because she saw that the courses of the two vessels were crossing, and because she saw there was risk of collision. She could have had no other object in giving the signal. The signal was made in view of the crossing course of the approaching ferryboat, and was intended for her, and was made in contemplation of risk of collision. It was an utterance by the George Washington as to the manœuvre she intended to adopt in reference to the D. S. Gregory. This is shown by the answer of the George Washington. The answer avers, that the D. S. Gregory approached the George Washington, and that the latter blew two blasts (meaning one signal consisting of two blasts), which indicated that she was going ahead of the D. S. Gregory (that is, that she was going to her own left, and was going to leave the D. S. Gregory on the starboard side of the George Washington). It is quite certain, on the evidence, that this signal was given by the George Washington before any signal was given by the D. S. Gregory. To this signal by the George Washington there was no response by the D. S. Gregory. The

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answer of the George Washington avers, that the D. S. Gregory paid no attention to the signal; and such is the evidence. It does not seem to have been heard on board of the D. S. Gregory. If it was heard, it was not responded to by the D. S. Gregory, nor was any manœuvre made by the D. S. Gregory, which indicated any assent by her that the George Washington should go ahead of her or to the left. Yet the George Washington kept on, with undiminished speed and without any divergence from her course, until she discovered that a collision must ensue, and then she stopped her engine, and reversed it. In this course of action, the George Washington violated the plain statutory rules of navigation. She had the D. S. Gregory on her own starboard side, and was, therefore, bound, by Article 14 of the Act of April 29th, 1864 (13 *U. S. Stat. at Large*, 60), to keep out of her way, there being risk of collision from their crossing courses. The George Washington manifested her idea that there was risk of collision, by giving the signal she did. The D. S. Gregory was approaching on the starboard side of the George Washington. Under these circumstances, the George Washington had no right to keep on at such a rate of speed as twelve miles an hour toward the entrance to the slip of the ferryboat. It was her duty to keep out of the way of the ferryboat. Instead of that, she ran directly, with undiminished speed, into her way. She had no right to dictate, by signal, to the ferryboat, what course the ferryboat should pursue, much less had she a right, when she found that her signal was not responded to and not heeded, to persist in maintaining her course and her speed. When she gave her signal, indicating, in her judgment, risk of collision, she ought to have slackened her speed, or, if necessary, stopped her engine and reversed it. Article 16 of the Act before mentioned is imperative, that every steam vessel, when approaching another vessel so as to involve risk of collision, shall slacken her speed, or, if necessary,

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stop and reverse. The expression, "risk of collision," as used in the 14th and 16th articles of the Act, has a different meaning from the expression, "immediate danger," used in the 19th article. "Risk of collision" means chance, peril, hazard, or danger of collision merely, and not immediate danger. In view of the fact that the George Washington herself apprehended peril of collision, as manifested by her signal that she was going to adopt a certain course to avoid such peril, she cannot now be heard to say that there was not, at the time she gave the signal, any risk of collision. It was her duty at that time to have slackened her speed, so as to have been controllable. If she had done so, she would have been able to fulfill her duty of keeping out of the way of the ferryboat. Her failure to do so makes her responsible for the collision.

As to the D. S. Gregory, she knew that it was the duty of the George Washington to keep out of her way, and that it was her own corresponding duty to keep her own course, and thus permit the George Washington to keep out of her way. Instead of keeping her course, she changed it. Her answer sets forth fully the faults of her navigation, and they are fully proved. The courses of the two vessels were crossing, and the ferryboat had the George Washington on her own port side. It was, therefore, by Articles 14 and 18 of the Act, the duty of the ferryboat to keep her course, if there was risk of collision. That there was risk or peril of collision apprehended by the ferryboat is shown by the fact that, simultaneously with the change of course, she gave a signal to the George Washington consisting of one blast of her steam whistle. The answer of the ferryboat states, that this signal indicated her intention to port her helm and pass to the right of the George Washington, and that, at the same time she gave the signal, she ported her helm, with the expectation that the George Washington would port her helm and pass to the right of the ferryboat;

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that this signal was given when the George Washington was about five hundred yards distant; that the signal was unheeded by the George Washington, which continued her course in the same direction and at the same speed of twelve miles an hour; that, when the George Washington had approached to within about three hundred yards of the ferryboat, the latter gave another signal, consisting of one blast of her steam whistle; and that this second signal was also unheeded by the George Washington. These averments of the answer are sustained by the proof, and are sufficient, of themselves, to convict the ferryboat of faulty negligence. Her answer states, that the effect of porting her helm was to change her course more eastwardly. This was the fact. It brought her course more toward a right angle to the course on which the George Washington was running. This change of course by the ferryboat was a violation of her duty, It contributed to the collision, and makes her responsible for the collision. It was not a change of course caused by any danger of navigation, or by any other special circumstance, and it was not a manoeuvre caused by the pressure of immediate danger, so as to be within the exceptions contained in Article 19 of the Act. This change of course was persisted in by the ferryboat, notwithstanding she perceived that her new course was every instant involving greater peril of collision, and although the George Washington paid no heed to her signals, and did not respond to them, but kept her course. And, even if it should be admitted, that the ferryboat adopted her new course at such a distance from the George Washington as to make it a course which she was entitled to keep, under Article 18, as against the duty of the George Washington, under Article 14, to keep out of her way as well after such change of course as before, still it was the duty of the ferryboat, under Article 16, to have slackened her speed, and stopped her engine, and reversed it. She did not do so. She gave her sig-

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nal, ported her helm, received no response to her signal, kept on at her speed, gave another signal, received no response to it, still kept on, and then rang the jingle bell to put on all the steam that could be got, which was done, and the crash came. Greater and more culpable recklessness in navigation cannot well be conceived. At the time she whistled, because there was risk of collision, it was her duty, because there was such risk, to have slowed, if not to have stopped her engine and reversed it. When she whistled a second time, if not before, it was her duty to have stopped her engine and reversed it. And she was conscious that this was her duty, for her answer avers, that, when she found that her second signal was disregarded by the George Washington, the engine of the ferryboat was stopped. This is utterly untrue. Not a single witness asserts it. On the contrary, the testimony is clear, that the speed of the ferryboat was not slackened. Her engineer says that the jingle bell to go ahead fast was rung and obeyed just after the first signal was given by the whistle of the ferryboat. Her full speed was kept up to the moment of collision. If she had slowed, as was her duty, when she first whistled, she would have been under control, and could have manoeuvred to avoid a collision, notwithstanding the course taken by the George Washington. And this is equally true in regard to the George Washington. If she had slowed, as was her duty, when she whistled, she would have been under control, and could have manoeuvred to avoid a collision, notwithstanding the change of course by the ferryboat, and notwithstanding the ferryboat's failure to diminish her speed.

It is very plain, on the evidence, that each boat was attempting to head off the other. Neither would give way to the other. Whether each failed to hear the signal or signals given by the other or not, each saw plainly what the other was attempting to do, and each blindly and recklessly rushed into the impending peril. Each



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violated two of the clearly prescribed rules of navigation in regard to steam vessels, and each must bear the consequences of its acts. These views would equally apply if either or each vessel were prosecuting the other for damages caused by the collision. As respects the libellant, the obligation of the ferryboat to her, growing out of the contract for carriage, to be guilty of no negligence from which she could suffer, was more immediate than the obligation of the George Washington toward the libellant. But the facts of the case are such as to make both vessels responsible to the libellant for the damages she suffered by this collision, which was caused by the contributing, concurrent, and co-operating negligence of both. She has a right to join both of them in one suit in the admiralty, and have a decree therein against each or either, for her damages (*The Steamer New Philadelphia*, 1 *Black*, 62, 76; *Gordon v. The Mary J. Vaughan and The Telegraph*, *U. S. Dist. Court, S. D. N. Y. August*, 1866; *Colegrove v. The New York and New Haven R. R. Co. and The New York and Harlem R. R. Co.*, 20 *N. Y. R.* 492).

The answer of the George Washington sets up, as a defence against the libellant's right to recover, that, at the time of the collision, she was traveling in this State on Sunday, in violation of a law of the State. The libel avers, that the libellant took passage on the ferryboat for the purpose of attending divine service at her usual place of worship in the city of New York. The testimony establishes this fact, and also that the place of worship was within twenty miles of her residence, from which she departed. The statute of New York which forbids traveling on Sunday (1 *R. S.*, part 1, chap. 20, title 8, art. 8, sec. 70), excepts the case of a person going to or returning from a church or place of worship within a distance of twenty miles. But, even if it were shown that the libellant was at the time violating the statute in question, that would be no objection to her right to recover in this suit. The State alone can take cognizance

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of her violation of the law, and punish her for it. This court cannot punish her by withholding from her her right to damages for this collision (*The Philadelphia, Wilmington, and Baltimore R. R. Co. v. The Philadelphia and Havre de Grace Steam Towboat Co.*, 23 *How.* 209). If such an objection could be set up in any case, it could scarcely be the policy of the law to permit it to be taken on behalf of a vessel which was at the time running as an excursion boat on Sunday, and assisting in the violation of the very statute invoked.

It only remains to fix the amount of damages which the libellant is entitled to recover. She was confined to her bed for nearly three months, and suffered very great pain during all that time. She is, and, on the evidence, always will be, unable to work for her support as she did before. One of her legs is shorter than the other, and the medical testimony is, that she will never entirely recover from the effects of the accident. It is shown that she herself paid out, for nursing and care of herself, the sum of \$100. She was a domestic at service in a family as a nurse of children. The bill of the surgeon who attended her amounted to \$613. His services were skillful, and are shown to have been worth fully that sum and more. Besides the nursing and care so paid for, she received much that was gratuitously bestowed, and was necessary to her comfort, and contributed greatly to ameliorate her condition. The value of this she is entitled to recover, as it was bestowed upon her because of her humble condition and her pecuniary need. I think an allowance for medical attendance and care and nursing, of \$1,000 in all, is not an exaggerated amount. This sum represents actual outlay.

Then, as to what she has lost by the accident. She was receiving, at the time, \$12 a month and her board, as wages. She was a competent and faithful person, and capable of continuing to earn that amount. She can no longer earn it, and the evidence is satisfactory that, but

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for a charitable feeling on the part of kindly disposed friends, she could earn nothing steadily, regularly, and certainly. This, then, is a loss to her of \$144 a year, and of her board, which it is reasonable to put at \$6 a week, or \$312 a year, making a total loss of \$456 a year. The libellant was, at the time of the accident, about 40 years of age. The sum required, according to the Northampton tables, to produce, at that age, an annuity for life, of \$456, is \$4,881.48. This sum, added to the \$1,000 before mentioned, makes \$5,881.48.

Thus much the libellant is entitled to recover, as if she were a portion of the cargo of the ferryboat, which its owner is entitled to have restored, repaired, and replaced in the condition in which it was at the time of the collision. The aggregate sum named includes nothing for any attendance which it seems probable, from the evidence, she will require because of her disabled condition, and nothing for the physical pain and suffering which she has undergone, and which the medical testimony shows she must continue to suffer while she lives, and nothing for the distress of mind she has suffered, inseparable from the crushing of all hopes for the future in one dependent on the labor of her hands for her daily bread. Such physical pain and such mental distress are a legitimate ground for damages in a case of this kind, and are to be compensated by a pecuniary reward (*Ransom v. The New York and Erie R. R. Co.*, 15 *N. Y. R.* 415; *Curtis v. The Rochester and Syracuse R. R. Co.*, 18 *N. Y. R.* 534). I think an allowance, on this ground, sufficient to bring up the entire sum to the amount claimed in the libel, \$10,000, is proper. The claim made by the libellant is a moderate one, and has been urged in no spirit of exaggeration. The injury to her was caused by the grossest negligence, particularly on the part of the ferryboat, because the slightest negligence on the part of the ferryboat was gross and culpable, in view of the obligation to the libellant as a passenger; and I am satis-

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fied that a jury, if the pleadings were in a shape to admit of it, would award more than the sum of \$10,000.

I allow nothing for exemplary, punitive, or vindictive damages. The case is not one of malicious or wilful injury, although one of reckless negligence, and is not a proper case for exemplary damages.

Let a decree be entered against both vessels for \$10,000, with costs.

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MARCH, 1868.

**CHARLES SAGORY vs. J. FRITZ WISSMAN, ADMINISTRATOR, &C., OF FREDERICK WISSMAN, DECEASED.**

**FOREIGN CONSUL.—JURISDICTION OF STATE COURT.—BILL AND CROSS BILL.—STRICT FORECLOSURE.—EFFECT OF REPLYING TO A BAD PLEA.**

Where a suit at common law was brought against the defendant, a foreign consul, the declaration being in debt, on a bond for \$40,000 executed by the defendant to the plaintiff, September 30th, 1851; and the defendant's plea set up that the bond was secured by a mortgage on lands in Virginia, conditioned that, if the bond were not paid, the plaintiff might enter into the lands and sell them, and retain his debt out of the proceeds, and that, on the 6th of April, 1858, after the debt became due, the plaintiff did enter on the lands, they exceeding in value the amount of the debt, to sell and dispose of them, and that he might have sold and disposed of them, and paid his debt, but, instead of so doing, he had remained in possession, whereby the debt was paid and satisfied; and the plaintiff replied to the plea, setting up that the defendant, on the 4th of July, 1855, filed a bill in Chancery in a State Court in Virginia against the Buckingham Gold Company, alleging that he, as owner of the lands subject to the mortgage, had contracted to sell the lands to them, and they had taken possession, but had not paid the price, and praying a sale of the lands by decree of the court, and afterward filed a supplemental bill against the plaintiff, praying that he might be made a party, and that afterward, in June, 1857, after default in the payment of the mortgage, the plaintiff filed a bill, in the nature of a cross-bill in chancery, in the same court, against the defendant and others, for the purpose of selling the premises to pay the debt, and the defendant appeared and answered the bill, and afterward the bills came on to be heard together, and the court made a decree of sale, under which the lands were sold to the plaintiff, leaving a deficiency of

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\$18,899, and that the plaintiff's entry into the land was under that sale, and not otherwise; and the defendant rejoined, (1.) That the court in Virginia had no jurisdiction of the cause, inasmuch as the defendant was a foreign consul; and, (2.) That the plaintiff's bill in that court was not a cross-bill; and the plaintiff demurred to the rejoinder:

*Held*, That the courts of a State have no jurisdiction of suits against foreign consuls, but have jurisdiction of suits brought by them.

That the court of Virginia had jurisdiction of the suit brought by the defendant; but that the suit brought there by the plaintiff was not a part of the defendant's suit, but was an original suit, and, therefore, not within the jurisdiction of that court.

That the first rejoinder was, therefore, good.

That the second rejoinder was bad, it averring that the bill of the plaintiff was not a cross-bill, whereas the replication averred that the bill was in the nature of a cross-bill.

That a strict foreclosure of a mortgage is a payment of the debt, but the entry alleged in the defendant's plea was not a strict foreclosure, but an entry to sell and pay the plaintiff's debt; and such an entry was no defence to the bond.

That the defendant's plea was, therefore, bad; and that, although the plaintiff had replied to it, the defect was not cured thereby, and the plaintiff was, therefore, entitled to judgment.

This case came up on a demurrer by the plaintiff to each one of two several rejoinders by the defendant to a replication by the plaintiff to a plea by the defendant to the first count of the plaintiff's declaration. The suit was brought against Frederick Wissman in his lifetime, and the pleadings were framed prior to his death.

The declaration was in debt, for \$40,000. The first count set forth, that the defendant was the consul of the free city of Frankfort-on-the-Main, for New York, and it was founded on a bond executed by the defendant to the plaintiff, September 30th, 1851, for \$40,000.

The plea set forth, that the bond sued on was secured by a mortgage of even date, executed by the defendant to the plaintiff, upon certain lands in Buckingham County, in the State of Virginia, conditioned that, if the debt were not paid when due, the plaintiff might enter into and take possession of the lands, and sell them, and retain his debt out of the avails, with costs and expenses, paying the overplus, if any, to the

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defendant; that, on the 6th of April, 1858, after the debt became due, the plaintiff entered into and took possession, in his own right, of the lands, they exceeding in value the amount of the debt, to sell and dispose of the same, and which he might have sold and disposed of, and, out of the avails, have paid the debt and the costs and expenses, but that, instead of doing so, he had ever since remained, and still remained, in possession thereof, and claimed to be the absolute owner thereof, and as such had ever since received, and still did receive, the rents and profits thereof, whereby the debt was paid and satisfied. The plea concluded with a verification.

The replication, after craving oyer of the mortgage mentioned in the plea, set forth, that the defendant, on the 4th of July, 1855, filed a bill in Chancery, in the Circuit Court of the county of Buckingham, in the State of Virginia, sitting as a Court of Chancery, a court of general jurisdiction, against the Buckingham Gold Company, a corporation, alleging that the defendant, as owner of the lands subject to the mortgage, had contracted with said Company for the sale of the lands to them, and that the Company had gone into possession of the lands, but had made default in paying for them, and praying that the lands might be sold under the decree of said court; that afterward, and on the 18th of September, 1856, the defendant filed in the same court a supplemental bill against the plaintiff, setting forth the said mortgage, and that the whole of its principal and a large amount of interest on it were due, and praying that the plaintiff might be made a party to said suit; that the plaintiff filed his answer to said original and supplemental bills, and afterward and on the 3d of June, 1857, after default in the payment of the mortgage, filed a bill in chancery in the nature of a cross-bill, in said court, against the defendant and others, for the purpose of selling the mortgaged premises, unless the defendant should redeem them, and of applying the pro-

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ceeds toward the debt due to him by the defendant; that the defendant appeared and answered the bill, and admitted its allegations; that, on the 16th of September, 1857, the original and supplemental bills of the defendant, and the cross-bill of the plaintiff, came on to be heard together by the court, and it was decreed, that, unless the defendant should pay to the plaintiff, within sixty days from that date, \$24,800, with interest at the rate of six per cent. per annum on \$20,000, part thereof, from September 30th, 1856, till paid, the defendant should be foreclosed from redeeming, and the premises should be sold at auction, and the plaintiff might become the purchaser; that, on the 24th of December, 1857, the premises were duly sold at auction, under the mortgage and the decree, for \$9,100, to the plaintiff, leaving a deficiency due to the plaintiff, on the mortgage, of \$18,399.75, with interest from December 24th, 1857; that the premises were duly conveyed to the plaintiff under the decree; and that the plaintiff entered into possession of the premises by virtue of said sale, and not otherwise. The replication concluded with a verification.

The first rejoinder set forth, that, before, and at the time of, the commencement of the suits by and against the defendant, mentioned in the replication, and before and at the time of the commencement of the suit against him in which the decree was rendered, and at the time the decree was rendered, the court in Virginia was a State Court, and the defendant was consul, in New York, of the free city of Frankfort-on-the-Main, duly accredited, and the State Court had no jurisdiction of the cause, but such jurisdiction belonged exclusively to courts established under the Constitution and laws of the United States. This first rejoinder concluded with a verification.

To this first rejoinder the plaintiff demurred, setting forth, in his demurrer, various causes of demurrer. Only one of them was presented for consideration on the ar-

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gument, namely, whether, as the defendant was a foreign consul, the State Court of Virginia had jurisdiction of the suits mentioned in the rejoinder. The ground taken by the plaintiff was, that, as the defendant brought a suit in the State Court, and made the plaintiff a party to it, as the holder of the mortgage on the premises in question, and as the plaintiff then filed a bill in the same court, in the nature of a cross-bill, against the defendant and others, for the purpose of selling the premises, and of applying the proceeds towards the satisfaction of the debt, and as the suits brought by both parties were heard together, and the decree that was made was made in both of the suits, the State Court had jurisdiction to make the decree; that the privilege of a consul to be exempt from the exercise of jurisdiction over him by a State Court, extended only to an adverse suit against him, and did not extend to a suit instituted by himself; that the suit brought by the plaintiff was not an original suit; and that the jurisdiction acquired by the State Court over the parties, by the institution of the suit brought by the defendant, covered the cross litigation instituted by the plaintiff, although, if the bill filed by the plaintiff had been an original bill, the court would have had no jurisdiction of it, as against the defendant.

*W. M. Evarts*, for the plaintiff.

*S. P. Nash*, for the defendant.

BLATCHFORD, J. It is unquestionable that, under section nine of the Judiciary Act of September 24th, 1789 (1 *U. S. Stat. at Large*, 76), the courts of the States have no jurisdiction of a suit *against* a foreign consul (*Davis v. Packard*, 7 *Peters*, 276). There is no objection, however, to the bringing of a suit by a consul in a State Court. Although, by the Constitution (*Art. 3, sec. 2*), the judicial power of the United



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States extends to all cases *affecting* consuls, yet Congress has not seen proper to make the jurisdiction of suits brought by consuls exclusive in the courts of the United States. The State Court of Virginia had, therefore, undoubted jurisdiction of the suit brought by the defendant. But it had no jurisdiction of the suit brought by the plaintiff, if that suit was an original suit. The plaintiff claims that that suit was not an original suit, but was a cross-suit, and was a part of the suit brought by the defendant, and that, therefore, the court had jurisdiction to make the decree in it.

I think that it appears, by the replication, that the suit brought by the plaintiff, in the State Court, was an original suit. The replication does not state that the bill filed by the plaintiff was a cross-bill, but states that it was a bill in the nature of a cross-bill. The replication does not show why the plaintiff was made a party to the suit brought by the defendant, or what relief, if any, was prayed, in that suit, against the plaintiff. It merely states, that a supplemental bill was filed by the defendant, setting forth the execution and delivery of the mortgage, and that the whole of the principal and a large amount of interest was due thereon, and praying that the plaintiff might be made a party to the suit. It is apparent, that, on a bill of this character, no decree could have been made against the defendant, foreclosing his equity of redemption in the mortgaged premises. The bill filed by the plaintiff is stated, in the replication, to have been filed for the purpose of selling the mortgaged premises, in case they were not redeemed by the defendant, and of applying the proceeds toward the debt due to the plaintiff. The prayer of the original bill filed by the defendant is stated, in the replication, to have been merely that the premises should be sold. That the bill filed by the plaintiff was a bill to foreclose the equity of redemption of the defendant in the mortgaged premises, is shown by the averment, in the replica-

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tion, that the decree made by the court was, that, unless the defendant should, by a certain day, pay to the plaintiff a sum certain, the defendant should be barred from all equity of redemption in the mortgaged premises, and they should be sold at auction. It is quite clear, I think, that the bill filed by the plaintiff was not a cross-bill, but was an original bill for relief (*Story's Eq. Pl.* § 400, note 4). Therefore, if the defendant was, at the time, a foreign consul, the court had no jurisdiction of the suit, and no jurisdiction to make the decree in question, so far as that decree barred the defendant's equity of redemption. As the replication states the decree, it barred such equity, unless the defendant should pay to the plaintiff a certain sum by a certain day, and, when such equity should be barred, then the premises should be sold. It is under a deed made to the plaintiff on a purchase made by him of the premises, on a sale made of them under those circumstances, that, as the replication avers, he entered into the premises.

The demurrer to the first rejoinder is, therefore, overruled.

The second rejoinder is one which sets forth that the bill filed by the plaintiff in the State Court was not a cross-bill. This rejoinder concludes to the country.

To this second rejoinder the plaintiff demurs, and assigns, as one cause of demurrer, that the rejoinder ought not to have concluded to the country, and does not put in issue any matter of fact alleged in the replication. This is true. The replication avers that the bill filed by the plaintiff was in the nature of a cross-bill. The rejoinder avers that it was not a cross-bill.

The demurrer to the second rejoinder is, therefore, allowed.

The plaintiff insists, however, that, although both of the rejoinders may be good, the plea in question is bad; and that, as the defendant committed the first fault, by pleading the plea out of which the rejoinders grew,

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judgment must be rendered against the defendant on both of the demurrers. I think it very clear that the plea is bad. It avers that the mortgage contained a condition that, if the debt were not paid, the plaintiff might enter into the lands and sell them, and pay his debt out of the proceeds; that, after the debt became due, he entered into and took possession, in his own right, of the lands, they exceeding in value the amount of the debt, *to sell and dispose of the same*, but that, instead of doing so, he had continued in possession, claiming to be the absolute owner, and receiving the rents; and that thereby the debt is paid. A foreclosure of a mortgage on land, without a sale of the land, that is, what is called a strict foreclosure, is an extinguishment of the debt, provided the premises are of sufficient value to pay the debt. But this doctrine only applies to a case of strict foreclosure. It does not apply to a case where the mortgagee, instead of entering into possession of the premises by way of strict foreclosure, either on a decree of strict foreclosure, or by virtue of a power in the mortgage to that effect, enters for the purpose of sale. On a strict foreclosure, the mortgagee must credit the value of the premises on the debt, if they are of no greater value than the amount of the debt, but, if they are of greater value than the amount of the debt, the mortgagee is under no obligation to refund the overplus to the mortgagor. On a sale under a decree of foreclosure and sale, the debt is extinguished only up to the amount produced by the sale, and the balance may be recovered on the bond, the surplus, if any there be, on the sale, belonging to the mortgagor. These principles are fully settled in *Spencer v. Harford* (4 *Wendell*, 381), and *Morgan v. Plumb* (9 *Wendell*, 287). Although the plea in this case avers that the value of the premises was greater than the amount of the debt, yet it does not show that the mortgagee took possession of the premises by way of strict foreclosure, either under a

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decree or under the mortgage. It sets up no decree of any kind, but merely an entry by the plaintiff under the mortgage. It avers, that the power in the mortgage was, that the plaintiff might, on default in the payment of the debt, enter into and take possession of the lands, and sell them, and retain the debt out of the avails, paying the overplus, if any, to the defendant; and that, after the debt became due, the plaintiff entered into and took possession, in his own right, of the lands, to sell them, and that he might have sold them, and have paid the debt from the proceeds, because the lands exceeded in value the amount of the debt, but that, instead of selling them, he has remained in possession, claiming to be the owner of them, and receiving the rents and profits. The plea sets up nothing which shows that the defendant's equity of redemption in the lands is in any way barred, or foreclosed, or affected. He could, for aught that is shown by the plea, file a bill to redeem the mortgage. If the plaintiff should, in defence, set up the facts which are averred in this plea, those facts would be no defence to the bill. They are, therefore, no defence to this suit. The plaintiff has a right, notwithstanding the facts set up in the plea, and although he may have entered into and retained possession of the lands, under the circumstances and for the purpose set forth in the plea, to pursue any concurrent remedy which he has, to recover the debt from the defendant, subject, of course, to the right of the defendant to redeem the mortgage, and to compel the plaintiff to sell the lands and apply the proceeds on the debt. The defendant has no right to complain. He could have paid his debt. He gave to the plaintiff the right to enter for security, subject to the obligation to sell. He can enforce that obligation. But he cannot claim, as he does in this plea, that such entry paid the debt, because the lands were of more value than the debt. The plea is, therefore, bad in substance, and, it being so, the

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plaintiff did not cure the defect by replying to the plea, and there must be judgment for the plaintiff (*Wyman v. Mitchell*, 1 *Cowen*, 316, 322; *Griswold v. The National Insurance Co.*, 3 *Cowen*, 96, 119).

MARCH, 1868.

## 1,209 QUARTER CASKS AND 1,235 OCTAVES OF SHERRY WINE, OF VARIOUS MARKS.

## UNDERVALUATION.—BURDEN OF PROOF.—EVIDENCE.—APPRAISEMENT.

Under the Act of March 3d, 1863 (12 *U. S. Stat. at Large*, 737), the invoice of goods imported, which are procured otherwise than by purchase, must state their actual market value at the time and place, when and where, they are procured or manufactured.

Actual market value is the price at which the owner or the manufacturer of goods holds them for sale, in the ordinary course of trade.

Where, in an action to forfeit, for undervaluation, certain importations of sherry wine, from Cadiz, which had been invoiced at \$16 a quarter cask of 40 gallons, it appeared that agents in New York received, and sent to the manufacturers at Cadiz, orders for the wines, and delivered them on the wharf in New York, free of duty, at \$1.10 a gallon, effecting insurance on them in New York at the higher value:

*Held*, That if the jury were satisfied that this course of business was adopted for the purpose of concealing the real prices of the wines at Cadiz, they would be authorized to find that the sales upon such orders were sales at Cadiz prices, and that such sales might be considered in determining what was the actual market value at Cadiz, and the jury might consider the rate of insurance in determining that question; but if they found that this course of business was not adopted for that purpose, then such sales were not to be considered, because they would then be sales at New York prices, and, in the latter case, the rate of insurance was immaterial.

That, if the jury found that the invoice value was below the market value at Cadiz, they must then consider whether that undervaluation was either made "with intent to defraud the revenue," as is said in the Act of May 28th, 1830 (4 *U. S. Stat. at Large*, 409), or made "knowingly," as is said in the Act of March 3d, 1863 (12 *Id* 737).

That there is no real difference in meaning between these two expressions.

That evidence given to show the value of certain wine, previously sent to this country by the same manufacturers, and not under seizure in this case, was only to be considered in determining the question of intent.

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That evidence as to the cost of manufacturing a part of the wines, called Burgundy Port, might be considered by the jury in determining its market value in Cadiz, no evidence of sales in Cadiz of wines of a similar quality having been given ; but that similar evidence as to the cost of manufacture of the sherries, was not to be considered on the question of the market value of the sherries.

That the jury must be satisfied, before they could forfeit the wines, that there was a guilty knowledge, on the part of the manufacturers, that the wines were undervalued ; and that "guilty knowledge" means no more than "knowledge."

That the record of the appraisement and reappraisement of these wines at the custom house in New York, previous to their seizure, was to be taken into consideration on the question of the market value of the wines at Cadiz, but was not the highest evidence on that question.

Where letters purporting to contain propositions for the purchase of wines, were received by the manufacturers abroad, and in reply they named their prices for wines for export for cash :

*Held*, That if the manufacturers believed that the letters contained regular mercantile propositions, and answered the letters and gave the prices on that supposition, the jury might infer that they would have sold the same wines to any body at the same prices, and that there was a market value thus made and fixed by them ; that it was a question for the jury whether the manufacturers believed that the letters contained real proposals or not ; and that, if they did so believe, it made no difference whether the proposals in the letters were in fact real or not.

The appraisement and reappraisement of goods imported is not conclusive as to their market value, upon either the Government or the claimants.

The policy of the law allows the seizure, under certain circumstances, of the books and papers of parties suspected of being concerned in frauds upon the revenue, and also sanctions the employment of informers, and gives them a share of the proceeds of property seized, and that policy should not be inveighed against, to influence the minds of the jury.

Where probable cause is shown for the forfeiture of imported goods, the burden of proof is upon the claimants to show their innocence.

This was an action to forfeit the wines above named for undervaluation. The wines were imported into New York from Cadiz, in Spain, where they were manufactured by the firm of Lacave & Echeopar, and were called Crown sherry, except a small portion of Burgundy Port in one invoice. There were several invoices of the wines, by different vessels, and the value stated in the several invoices was \$16 a quarter cask (except two casks marked P & A, invoiced at \$30 and \$22), being the same value which had been stated in a series of previous in-

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voices. The invoices were all sworn to by one of the firm of Lacave & Echeopar. As they were presented, they were passed through the custom house, but finally, in consequence of information brought to the authorities, the appraisers advanced the price of one invoice \$4 a quarter cask, for the purpose of securing a reappraisement. On the reappraisement, the wine was again valued at the invoice value. Notwithstanding this, the Government seized the wines, and the information in this case was filed to forfeit them.

The Government claimed, and gave evidence tending to sustain its claims, that the wines were sold by Lacave & Echeopar at a higher rate than the invoice value, that the system of selling them which was adopted, was a plan to cover up the real value of the wine; that they were insured at much higher rates in New York; and that certain previous transactions with Simon De Visser, Lenau & Co., and one Barnard of Boston, showed higher prices paid for similar wines. They furnished evidence, also, of experts, who gave a higher value to the wine.

The claimants gave evidence to show, that their agents in New York, George Miln, and Galway & Casado, made all the sales of the wine in New York, and guaranteed the sales; and they claimed that those sales, which were made at \$1.10 a gallon, deliverable in New York, duty paid, were not evidence of the market value of the wines in Cadiz. They claimed, also, that the reappraisement was conclusive upon the question of value; that the claimants and another firm, that of Bensusan & Co., had offered to sell this wine at the same rate, in Cadiz, on orders sent them by letters from one Samuel D. Jones, which, as it appeared, were actually written and sent by Farwell, an officer of the customs, and a witness in the case for the Government; that the wines which were claimed to have been sold at higher values were wines of a different quality from this Crown sherry; and that this was a wine manufactured exclu-

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sively by Lacave & Echeconpar, and sent by them entirely to the United States. They gave, also, evidence of the cost of manufacture of a small quantity of the wine called Burgundy Port, as to which no sales were proved.

The case occupied twenty-two days in the trial before the jury.

At the close of the evidence, the counsel for the Government requested the court to charge the jury as follows:

1st. That, upon the evidence given by the claimants, the probable cause of condemnation had not been relieved, and the jury must find a verdict for the United States.

2d. That the sales upon orders, at \$1.10, deliverable upon the wharf in New York, were sales at Cadiz prices.

3d. That the sales upon orders, at \$1.10, deliverable on the wharf in New York, are evidence from which the jury might find the actual market price in Cadiz, by deducting therefrom freight, insurance, duties, and other custom-house charges, and the expense of bringing the wine to the place of delivery.

4th. That if the jury should find, upon all the evidence, that the course of business adopted by the claimants, of selling their wines at the price of \$1.10, deliverable on the wharf in New York, was a mode of business adopted for the purpose of concealing the real prices of the wines at Cadiz, the jury must then find that sales upon such orders were sales at Cadiz prices, to be ascertained by deducting from said price of \$1.10 the expenses of freight, insurance, duties, and other charges upon the same, from the time of shipping them at Cadiz to their delivery in New York.

5th. That the sales of wine at \$1.10, deliverable on the wharf in New York, were, upon the evidence, not sales by George Miln, as a commission merchant, nor by Lacave & Echeconpar, as New York importers or merchants, but were direct sales by them as foreign manufacturers.



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6th. That if the wines under seizure were entered by means of invoices not truly expressing the actual market value of the wines at the time when, and in the country where, they were manufactured, with the knowledge on the part of the consignor or of the consignee that the invoices did not contain such actual market value, the goods were forfeited, and the jury must find for the United States.

7th. That if the jury should find, upon all the evidence, that the invoices did not contain such actual market value as aforesaid, and were made up by Lacave & Echeopar with intent to evade the payment of any part of the duties by law chargeable thereon, the goods were forfeited, and the jury must find for the United States.

8th. That the market value to which the manufacturer of wine is required to conform the valuation of his invoice, is of wine of the same grade and quality, as a general article of production and commerce in Spain, and that a manufacturer cannot escape the obligation to conform his invoice to that general market value, by the pretence or the fact that he does not offer his particular brand of wine in the market of Spain, but sends it in exportation; but, in such case, the valuation in the invoice should be conformed to the market value in Spain of the same grade or quality of wine.

9th. That, upon the evidence, the sales of seventeen quarters and thirty octaves of wine to M. Lenau & Co., and the three sales of wine to Simon De Visser, were actual sales in Cadiz by Lacave & Echeopar, at the several prices paid therefor by the purchasers.

The counsel for the claimants requested the court to charge the jury as follows :

1st. There are two questions of fact to be considered : 1. Were these wines undervalued by Lacave & Echeopar? 2. Had they a guilty knowledge that they were undervalued? Before these goods can be condemned, both of these questions must be answered in the affirmative. There must be a guilty undervaluation.

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2d. The presumption is that the officers of the Government have done their duty, and that these merchants have acted with truth and honesty. These presumptions are to be displaced by the evidence, if at all.

3d. The law requires the actual market value in Cadiz to be stated in the invoice, and the jury must disregard all evidence of sales and prices and profits here, or elsewhere, except in Spain.

4th. The law requires certain evidence of market value to be furnished by Lacave & Echecopar: 1. Their own written statement of the market value, on the invoice, which, until disproved, is to be taken to be true. 2. The official certificate of the American consul at Cadiz, which, until disproved, is to be taken to be true. 3. These are, in contemplation of law, of a very solemn and important character, being required by law to be made at the time of shipment and at the place where the value is to be ascertained, and the consul is to be presumed to have performed his duty as to investigating and certifying as to the value of the wines, the character of Lacave & Echecopar, and the correctness of their statement on the invoices.

5th. The appraisers, having found the invoice value of these sherries correct, the fact is conclusive, and the jury must return a verdict for the claimants.

6th. If the court shall decline so to charge, then the court is requested to charge, that the certificate of the appraisers here, on the invoices, that the value is correct, is to be taken to be true till it be disproved, and the jury are to presume that the appraisers made the examination which the law imposed upon them as a duty under their official oaths.

7th. The record of the appraisalment and the reappraisalment have been put in evidence, and the appraisers themselves, including the merchant appraiser, and some of the witnesses examined before them, have also been put on the stand, and their evidence, confirming the re-

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sult of the appraisement, is evidence of the highest character as to the actual market value, and, until disproved, must be taken to be true.

8th. The actual cost of producing these wines, including a fair manufacturer's profit, is to be considered as evidence tending to show the market value in Cadiz. If there were no direct evidence as to that market value, then the cost of production, with a fair profit, would be good evidence of market value; and, if there be any doubt on the direct evidence, then the proof of cost, with a profit, would tend to remove that doubt.

9th. The proof establishes, that the wine delivered, and to be delivered, in the city of New York, to Wellington & Cox, and others, upon orders communicated to Lacave & Echecopar, were so delivered and to be delivered upon sales actually made here by Miln, or by Galway & Casado, as the factor or factors of the said Lacave & Echecopar, and not upon sales thereof made in Cadiz, by reason whereof the prices, to be paid for said sherries in New York, cannot by the jury be considered, in determining the actual market value thereof in Spain.

10th. It appears, from the evidence, that all sales of wines made in pursuance of the aforesaid orders, were so made by Miln and by Galway & Casado, respectively, in said city of New York, as the factor and factors of the said Lacave & Echecopar, and at the risk of such factor or factors, as guarantors of the proceeds of such sales, and that no titles to such wines passed to the persons giving such orders, until the arrival and delivery thereof in New York by the said factor or factors, who, before making such delivery, were entitled to exact from the purchasers payment thereof, according to the terms and conditions of sales; by reason whereof, the prices to be paid upon such sales must, by the jury, be disregarded, in ascertaining the market value of said wines in Cadiz.

11th. The said Lacave & Echecopar acted in the double capacity of manufacturers of the said wines, and also as

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merchants and shippers for the exportation and sale thereof, and were under no obligation to sell any part of the same in the market of Cadiz, and might lawfully there make contracts for the sale and delivery of said wines in the city of New York, at such prices, payable in said city, and for such profits, as they could obtain, however much these might be beyond the actual market value of the said wines in Cadiz; and neither such prices nor profits payable in New York, can by the jury be considered, for the purpose of arriving at the actual market value of said wines in Spain.

12th. The revenue laws of the United States do not assume to dictate under what conditions a foreign manufacturer shall dispose of his property, nor to what countries it shall be shipped. It was perfectly proper for the claimants in this case, if they saw fit, to refuse to sell their wines in Spain, but it was nevertheless their duty to state, in their invoices, the actual market value thereof in Spain, and it is the duty of the jury to determine, from all the evidence, whether that invoice value was correct and true.

13th. If the court shall hold, that the communication to Lacave & Echecopar of orders for wines given by Wellington & Cox and others, and the assent thereto by the former as to prices, constituted agreements in Cadiz, between them and the persons giving such orders, for the sale of the wines mentioned therein, then the court is requested to charge, that, inasmuch as such wines were, by the terms of such orders and agreements, to be delivered to said persons in New York at a certain price per gallon, free of all duties, charges, and risks, the sum there to be paid, being home and not foreign value, cannot, by the jury, be regarded, in determining the actual market value of said wines in Cadiz.

14th. The Government insists, that said orders for a price payable in New York, were not in reality sales here, but were, in fact, sales made in Cadiz, and at Cadiz

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prices, and that such sales were, therefore, intended as frauds upon the revenue laws of the United States, and to cover up and conceal the actual market value of said wines in Cadiz. On this point, the court is requested to instruct the jury, that fraud must be proven and cannot be presumed, and that, from the evidence, it appears, that all risks concerning the said wines, and all expenses and duties payable thereon, from the time the same left Cadiz until they were delivered, in New York, to the persons giving said orders, were borne and paid, not by the said persons, but by Lacave & Eche copar, who, in consideration thereof, might lawfully charge and receive such profits as they could obtain beyond the actual market value of said wines in Cadiz, by reason whereof the jury must, in determining the market value thereof at that place, entirely disregard the prices paid therefor in said city of New York.

15th. If the court shall decline to give the instruction last above prayed, then the court is requested to charge the jury that, before they can find that the sales or contracts of sale, under said orders, were shams or covers for the purpose of defrauding the revenue, as above suggested, they must be satisfied, from the evidence, that such sales or contracts were, in fact, made upon the understanding, between the said Lacave & Eche copar and the persons giving such orders, that the wines so ordered were to be the property of, and at the risk of, the persons ordering the same, from the time they were delivered on board, in Cadiz, until they should arrive in the city of New York, and must also be satisfied, from the evidence, that the agreements to deliver the said wines in New York at \$1.10 per gallon, free of all duties and charges, were shams and fraudulent covers for the unlawful purpose aforesaid.

16th. The court is also requested to charge, that the jury cannot, for the purpose of determining whether the said sales or contracts were mere shams or covers for the

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fraudulent purpose aforesaid, consider, as evidence, the prices agreed to be paid for said wines in the city of New York, such fact being, upon that issue, wholly immaterial.

17th. It being admitted, by the Government and the claimants, that all the wines under seizure left Spain for New York the property of Lacave & Eche copar, who obtained them by manufacture, the invoices accompanying the same are required by law to contain the actual market value of the merchandise at the time and place of manufacture.

18th. It is the duty of the jury to ascertain, first, the time and place of manufacture; next, the market value of the wines under seizure, as an article of commerce, at such time and place; and, then, whether the prices stated in the invoices presented at the custom house conform to such market value.

19th. If the jury find that the prices stated in the invoices do conform to the market value of the merchandise as an article of commerce, at the time and in the country of manufacture, then it is immaterial what may be the ultimate actual receipts of the shippers upon sales of the wines delivered in New York, free of all costs and charges; because, the revenue law only contemplates, in respect to invoice value, transactions of purchase and sale in the markets of Spain.

20th. If the jury find that any of the wines under seizure, or similar wines of Lacave & Eche copar, were not sold in the markets of the place of manufacture, or subjects of general commerce there, then they are at liberty to consider the value, at the same time and place, of the wines of other houses or manufacturers, of similar grade, quality, and character, in order to ascertain the correctness of the invoices in controversy, and, if there be no such similar wines, then the sum which it cost Lacave & Eche copar to produce the wines under seizure, with a fair manufacturer's profit added.

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21st. If the jury believe, that the parcels of wine marked P & A 1 and P & A 2, were invoiced at their real value in the actual markets of the place, and at the time, of manufacture, then neither they nor the invoice containing them is liable to condemnation; and the statement of higher prices sent to Miln is of no consequence in this case, unless the jury shall believe that the prices mentioned are not mere *pro forma* prices on which to effect sales in New York, but the actual market prices in Cadiz.

22d. Until the jury find that the wines under seizure were invoiced at less than their actual market value at the time and place of their manufacture, they cannot take into consideration any evidence in the case respecting, (1) the Mansanilla octave; (2) the Barnard cask of sherry; or (3) the De Visser transaction.

23d. In respect to the Lenau transaction, Booraem, who purchased the wine in New York, having testified that he is perfectly familiar with the Crown sherry, and that the latter is unlike the wine referred to, which he purchased of Lenau, it is the duty of the jury to compare the evidence of Booraem with the testimony of Escoura (whose attention was not called to the Lenau wine), and determine whether the two wines are the same; and, if the jury find they are not, or if they find that said wines were sent to New York on consignment, and not upon a sale in Cadiz at the risk of the buyer, then this transaction must be entirely excluded from consideration.

24th. If the house of Lacave & Echeopar believed that the letters purporting to be signed by Samuel D. Jones contained a regular mercantile proposition for a purchase of their Crown sherry wines, and if the house of Lacave & Echeopar answered this proposition, and fixed certain prices as those for which they would sell the same for export, then the jury are at liberty to infer that they would have sold the same wines to any body at the prices

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named, and also to infer that there was a market value thus made and fixed by the house of Lacave & Echecopar itself, and that such market value was as low as the price thus fixed, after deducting therefrom the cost of removing said wines from Cadiz, and placing them on board vessels in that port, for transportation to New York.

25th. The court is also requested to charge, that substantially the same remarks and instructions as last above given are also applicable to the letters to and from the house of J. Bensusan & Co., and to the prices named by them for the said wine.

26th. The court is also requested to charge the jury, that there is affirmative evidence in the cause, that the houses of Lacave & Echecopar and of J. Bensusan & Co., when they respectively answered the propositions contained in said letters, believed that the same were real proposals for the purchase of wines by a person desirous of buying the same for exportation to Canada, and no proof whatever to the contrary.

27th. If the houses of Lacave & Echecopar, and of J. Bensusan & Co., supposed, in answering the letters purporting to be signed by Samuel D. Jones, that they were written by a person who wished to become a customer in the ordinary way of trade, and if, in reply, they named their prices for cash for export for considerable quantities of said wines, it does not detract a particle from the value of the evidence, as evidence of market value in Cadiz, that neither Jones nor Farwell, in fact, intended to buy, and that the letters written in the name of said Jones were, in fact, written to obtain evidence to be used for the United States; because, the test to be applied is the state of mind of Lacave & Echecopar, and of J. Bensusan, at the times respectively when they wrote the letters stating prices, in reply to those purporting to come from the said Jones.

28th. Who and what the witnesses Henshaw and



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Marshall are, and the general credit to be given to their testimony, on your view of their examination and cross-examination, is left entirely to you ; for, of all this you are the exclusive judges.

29th. If the jury shall find, under instructions from the court in matters of law, or in any other way, that the invoice valuations of the wines under seizure did not conform to the value of such wines in the actual markets of the country of production, as required by the revenue laws of the United States, still they cannot return a verdict for the Government, unless they shall also find that such discrepancy was not the result of honest error on their part, in respect to matters of law or fact, but was made knowingly, with guilty knowledge, with design to evade the payment of duty which they knew was legally chargeable on the merchandise.

30th. The court is requested to charge the jury, that they cannot, for the purpose of ascertaining the market value, in Cadiz, of these wines, consider the sum for which they were insured in the city of New York, by the direction of Lacave & Ehecopar.

31st. The court is also requested to charge, that the De Visser transaction, the Mansanilla and Barnard transactions, and the other transactions proven, in which duties were to be paid by those in this country to whom the wines were sent, having been introduced in evidence by the Government for the purpose of showing intent, are entitled to little or no weight for that purpose, because Lacave & Ehecopar had no motive to undervalue the said wines.

For Government,—*Wm. M. Evarts, W. G. Choate, and Ethan Allen.*

For Claimants,—*E. W. Stoughton, E. C. Benedict, and Webster & Craig.*

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Judge BLATCHFORD then charged the jury as follows :  
Gentlemen of the Jury : The commendable attention and unwearied patience which you have manifested throughout this trial, the first steps in which were taken thirty-five days ago, and on which we have bestowed consideration now for twenty-two days, are commensurate with the zeal, and care, and distinguished ability with which the case has been presented to you by the learned counsel upon both sides, and with the importance of it to the parties, and with the magnitude of the principles involved in it. It concerns 1,826 $\frac{1}{2}$  quarter casks of wine, amounting in the aggregate, to 73,060 gallons, and the value of which, to-day, in this market, at the rate of \$1.10 in gold per gallon (allowing for a premium upon the gold) is about the sum of \$112,000. This statement measures merely the pecuniary value involved in this controversy. It is a measure of that pecuniary value, because, if the goods seized are forfeited, the owners lose that amount ; but it is far from being a measure of the principles involved in the controversy. They reach and extend (as you have been advised by the counsel upon both sides, in the course of this case, and as appears somewhat in the evidence) to other importations, and to other seizures of the same character of goods.

Now, as you recollect, the mass of the wine in this case is invoiced at the rate of \$16 per quarter-cask, the only exception, I believe, being the case of the two quarter casks called the Paris & Allen, or the P. & A. wine, one of which was invoiced at \$22, and the other at \$30 per quarter cask. The invoices which are alleged on the part of the Government to have been false and fraudulent, were all of them sworn to by one of the persons, who, it is admitted on both sides in this case, were the owners of the wine—one of the firm of Lacave & Eche copar. Therefore, the case, although involving such a large amount of property, becomes very simple in

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that aspect of it, and is no more complicated in respect to the ownership, the entry and the rate of valuation in the invoices, than if it covered only a single invoice of one quarter cask of wine, valued at \$16.

On the part of the Government, it is claimed in this case, that there has been a systematic series of undervaluations of these wines by the manufacturers of them, an intentional and wilful undervaluation, resorted to because of the *ad valorem* system of duties provided by law in regard to the wines; and the Government claims that it was resorted to with full knowledge on the part of the owners, Lacave & Echecopar, of what the law required, and of the values which they ought to state in their invoices. The Government claims that the invoices are below the actual market value of the wines in Cadiz. Throughout the observations which I may make to you, I shall speak of value in Cadiz: for, although the law speaks of value in the principal markets of Spain, yet it is conceded, on both sides, for the purposes of this trial, that actual market value in Cadiz is the proper test, because Cadiz is the principal market for these wines, and it does not appear that there is any other port from which these wines are exported, or in which they are largely dealt in, in the manufactured and completed state in which they are found ready for shipment. On the part of the claimants it is contended, that these wines are not valued in the invoices at a price under the actual market value, but that they are valued at a price fully up to the actual market value in Cadiz. That is the issue between these parties, and, subject to the observations in regard to the law, which I shall make to you, the question is wholly one of fact for you to determine. I shall make no comments upon the evidence, but shall leave the decision of the questions of fact involved entirely to your unbiased judgment, satisfied that the close attention which you have paid, throughout the trial of the cause, to the testimony as given, and to the elaborate arguments

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of the counsel on both sides, has fitted your minds for a proper consideration of the questions of fact which you are to decide.

The information is founded upon three statutes of the United States—the Act of March 2d, 1799 (1 *U. S. Stat. at Large*, 637), the Act of May 28th, 1830 (4 *Id.* 409), and the Act of March 3d, 1863 (12 *Id.* 737). But the counts under the Act of 1799 may be laid entirely out of view. The 66th section of the Act of 1799 covers only the case where property ought to be invoiced at its actual cost, which, under the law as it now stands, is only where the property is imported by the purchaser of it. Therefore, the case is presented for your consideration as if the counts under the Act of 1799 were not in the information, and as if the information were founded solely on the other two statutes, the 4th section of the Act of 1830, and the 1st section of the Act of 1863. The provisions of these two statutes I will now state to you. So far as they apply to this case, they are very simple.

By the 4th section of the Act of 1830, it is provided, that if an invoice be made up with an intent, by a false valuation, or false extension, or otherwise, to evade or defraud the revenue, the goods contained in the entry made on such invoice shall be forfeited to the United States. The other statute counted upon is the first section of the Act of March 3d, 1863, which provides, that if any owner of any merchandise shall knowingly make, or attempt to make, any entry thereof by means of any false invoice, or of any invoice which shall not contain a true statement of all the particulars required by that section, the merchandise shall be forfeited. The only material and substantial apparent difference between these two statutes is, that the one speaks of making up an invoice with *intent* to evade or defraud the revenue, and the other speaks of *knowingly* making an entry by means of a false invoice. “Intent to evade or defraud” is the wording in the one case; “knowingly” in the

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other. I shall have occasion further on in my remarks, to call your attention to those two expressions in the two statutes.

The Act of 1863, as I have just read to you, defines the offence to be, knowingly entering or attempting to enter goods upon a false invoice, or upon an invoice which does not contain a true statement of all the particulars required by that Act. What are the particulars required? So far as they apply to the present case, they are these: If the merchandise is obtained in any other manner than by purchase (and, in the present case, there is no dispute in regard to the fact that the merchandise was not obtained by purchase, for Lacave & Echeconpar did not purchase any of the wines that are under seizure, in the state in which they are now found as an article of merchandise), the invoice must state the actual market value thereof, at the time and place when and where the same was procured or manufactured. On the other hand, if the merchandise is obtained by purchase, the invoice must contain a true and full statement of the time when and the place where the same was purchased, and the actual cost thereof, and of all the charges thereon, that is, the actual cost thereof to the person who so purchases it in a condition ready for shipment, and undertakes to enter it in that condition. These two provisions are very plain and simple. If the merchandise is obtained in any other manner than by purchase, the invoice must state the actual market value thereof at the time and place when and where the same was procured or manufactured. But, if the merchandise was obtained by purchase, then the invoice must contain a true and full statement of the time when and the place where the same was purchased, and the actual cost thereof, and of all the charges thereon.

The policy of these provisions of the law has been somewhat commented upon and stated to you by the

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counsel for the Government. It must at once be apparent to you why this system was adopted. It appears first in our statutes in 1823. Prior to that time there was no such distinction between goods purchased and goods not purchased ; but Congress, in its wisdom, probably because of the course and exigencies of trade at that time, introduced this distinction into the revenue laws. The reasons were manifestly these : Every *ad valorem* system of revenue must be made, as far as possible, uniform in its operation, or it will be oppressive and unjust. Merchandise, as a matter of course, will be shipped to this country by the man who manufactures it, and like merchandise will be shipped here by the man who purchases it. If the manufacturer is allowed to invoice his merchandise at what it costs him to make it, and the purchaser is compelled to invoice his goods at what it costs him to buy them, inasmuch as the purchaser must pay for the goods not only what it costs the manufacturer to make them, but the profit of the manufacturer in addition, an unfair discrimination is made against the purchaser, enabling the manufacturer to undersell him in the market here, and in the end surely drive him out. This is a principle which is easy to be understood, and commends itself to the good sense of every one. Hence the rule referred to, and which finds its expression in the language which I have cited from the Act of 1863. In the case of a purchaser of goods, the cost to him to buy the goods abroad, is assumed, as a general rule, by the law, to indicate the actual market value of what he buys, it being presumed that he buys at the ordinary actual market value ; and, to put the purchaser upon the same footing with the manufacturer, to make no unjust discrimination against the purchaser, and in favor of the manufacturer, and to enable the Government to collect substantially the same amount of duty, at the same *ad valorem* rate, on the same quantity of the same description of merchandise,

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whether shipped here for account of the purchaser of it, or for account of its manufacturer, the law requires the manufacturer to invoice his goods, when he imports them and enters them here as his own, at their actual market value in the principal markets of the country where they were manufactured, no matter what their cost to him, no matter whether they cost more or less than such actual market value—in substance and effect, it requires the manufacturer to invoice them at what the purchaser would have to pay for them, and invoice them at. That is the theory of the law, and the object of the law; and its language endeavors to carry out that theory and object, as far as it is possible for human legislation to carry out a principle.

It being, therefore, the admitted duty of Lacave & Echecopar, as the manufacturers of these wines, to invoice them at their actual market value at Cadiz, the place of their manufacture, at the time of their manufacture, the question next presented for consideration is—what is the meaning of the words “actual market value,” in the statute? It has already appeared, in the course of the remarks addressed to you by the counsel in this case, that the language of the Acts of Congress on this subject is somewhat variant in the actual words used. Some of the statutes use the expression “market value,” some use the expression “fair market value,” some use the expression “actual market value.” But there is no substantial difference, nor has there ever been, in meaning, in these various expressions. The statute which says “fair market value,” means “actual market value; and the statute which says, “actual market value,” means “fair market value.” The only other possible meaning of the word “actual,” is that which I suggested early in the trial, namely, value in the actual market, as contra-distinguished from a hypothetical, or notional, or ideal value, which may be affixed to an article in a particular case, for a particular reason.

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In other words, the common sense of every man must be applied to this expression, as it is to all the other transactions of life. Whatever men in the ordinary dealings of society, between man and man, would consider to be the fair actual market value of property, that is its actual market value, within the meaning of the revenue laws. But, independently of this, we have the authority of the Supreme Court of the United States, as to the meaning of the words "actual market value." In a case which came before that court (*Oliquot's Champagne*, 3 *Wallace*, 114), brought up from California, in regard to the seizure of some Champagne wine, the District Court, on the trial of the cause, gave an exposition of the meaning of the words "actual market value," in the statute of 1863; and the Supreme Court say, that the charge of the District Judge embraced all the points in the case, and is satisfactory to the Supreme Court, and they concur in it. According to that decision, the meaning of the words "actual market value," is the price at which the owner or the manufacturer of goods holds them for sale; the price at which he freely offers them in the market; such price as he is willing to receive for them if they are sold in the ordinary course of trade. The particular language of the District Judge in that case (which was so emphatically sanctioned by the Supreme Court) was, in substance and almost in words, what I have just stated to you.

That being the law, the next question is—what is the evidence as to actual market value? Both sides have gone into evidence as to whether the price of \$16, stated in these invoices as the actual market value of these wines in Cadiz, and sworn to by Mr. Lacave, in his oath upon the back of each one of these invoices, to have been the actual market value of the wines in Cadiz, was really the actual market value. The Government claims to have shown that the market value in Cadiz at the time was largely in excess of the value so stated by Mr.



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Lacave in the invoices, while the claimants insist that the evidence shows that the price of \$16 is fully up to the market value, and, in fact, according to their views of the case, is a little in excess of it. The issue, therefore, reduces itself to one of fact, so far as the question of market value is concerned.

It is necessary, now, that I should call your attention to one or two legal propositions that are involved in the consideration of some portions of the evidence. The counsel for the Government claim, on their side, that they have four lines of evidence upon this question of market value: (1.) The sales on orders, deliverable on the wharf in New York, at \$1.10 per gallon; (2.) The sales to Lenau, which are claimed to have been at 75 cents per gallon, and the price named by Lacave & Echecopar to Melchers, which the counsel for the Government claim is shown, by the evidence, to have been 75 cents per gallon, and for Crown sherry; (3.) The insurance of the wines at 70 cents per gallon, by direction of Lacave & Echecopar; (4.) The testimony of the experts on the part of the Government, Mr. Marshall and Mr. Henshaw, and other testimony, if there be any of that character. On the part of the claimants, the principal evidence, so far as I now recall it, on the question of market value, is: (1.) The letters of Lacave & Echecopar to Mr. Jones, and the offer contained in those letters; (2.) The like correspondence on the part of Mr. Bensusan with Mr. Jones, and his offer of wines to Mr. Jones, wines which the claimants say were, substantially and in fact, Crown sherry; (3.) The expert testimony of Mr. Bensusan, Mr. Escoura, Mr. Lenau, and perhaps some others, as to the actual market value of the Crown sherry in Cadiz. These represent, I think, substantially, the classes and ranges of evidence claimed by the respective parties in this case to be applicable to this subject.

In regard to the sales on orders received here by Mr.

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Miln, and transmitted by him to Spain, the wine being sent back in response, delivered here on the wharf, and paid for at the rate of \$1.10 per gallon in gold, you have heard the views of the respective counsel; but, in order to enable you to apply the facts, it is necessary for me to state to you what the law is upon the subject. It is this: If you shall find, upon all the evidence in regard to the transactions respecting wines ordered in this way, and delivered here on the wharf at the price of \$1.10 gold, per gallon, that the course of business adopted by the claimants, of selling their wines at that price, and thus deliverable on the wharf in New York, was a mode of business adopted for the purpose of concealing the real prices of the wines at Cadiz, then you will be authorized to find that sales upon such orders were sales at Cadiz prices; and, in such event, the prices which, from the evidence, you shall ascertain to be such Cadiz prices (by deducting from the \$1.10 the expenses of freight, insurance, duties, and whatever other charges upon the same are shown to be properly deductible, from the time of the shipment of the wines in Cadiz to their delivery in New York), may be properly taken into consideration by you in ascertaining the actual market value of the wines in Cadiz at the time. But if, on the other hand, you shall find, upon all the evidence, that the course of business adopted by the claimants, of selling these wines on orders, at \$1.10, deliverable upon the wharf in New York, was not adopted for the purpose of concealing the real prices of the wines in Cadiz, then you will throw entirely out of consideration every thing in regard to the price of \$1.10, because it will then have nothing to do with the case. It will then be the price here in the New York market, and will not be a Cadiz price.

With that single observation in regard to the law applicable to the \$1.10 transactions, showing to you under what circumstances you are at liberty to consider

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the evidence as to the \$1.10 price as bearing upon the question of market value, and under what circumstances you are not to consider it as bearing upon that question, I shall leave the entire evidence in the case to you, without any comment upon it, for your decision and determination, as bearing upon the question of actual market value. If you shall find, as matter of fact, that the invoice value was as high as the actual market value, then there is an end of the case, and you must find a verdict for the claimants; but, if you shall find that the invoice value was lower than the actual market value, then you will have to proceed to the consideration of another question—whether, under the Act of 1830, that undervaluation was made with intent to defraud the revenue; and whether, under the Act of 1863, it was made knowingly or unknowingly. Upon the question of knowledge or intent, I have stated to you the verbal difference in language between the two statutes—the one requiring an intent to evade or defraud the revenue, and the other requiring that the party should knowingly make, or attempt to make, an entry by means of a false invoice. That, however, is merely a verbal difference. There is no real difference in the meaning of the two expressions, as has been decided by the Supreme Court of the United States. In the case of *Cliquot's Champagne*, to which I have already referred, respecting the Champagne wine, which went up from California, on the trial before the District Court, the court was requested, by the counsel for the claimants, to charge the jury, “that the word *knowingly*, in the first section of the Act of March 3d, 1863, means, in connection with the language which accompanies and surrounds it, *fraudulently*.” The District Judge refused to give that instruction, and held that such was not the law, and his charge on that subject was approved by the Supreme Court, to which the case went, and which affirmed the judgment, in these words: “The court

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below was pressed to instruct the jury that *knowingly* is used in the statute as the synonyme of *fraudulently*. The instruction given was eminently just, and we have nothing to add to it." We have seen what the instruction was that was refused. Now, what were the instructions that were given? I shall read them to you as the instruction of this court upon this subject: "With regard to the question of intent, I am asked to charge you that you should be convinced that these goods, if invoiced below their market value, were invoiced *fraudulently* below their market value. The previous statutes passed by Congress had introduced, in many instances, the word 'fraudulently,' had defined the offence to be, making a false invoice 'with intent to defraud' the revenue, or evade the payment of duties." The learned judge here refers to the passage read to you from the Act of 1830. He proceeds: "This statute," the statute of 1863, "apparently, *ex industria*, omits these expressions, and substitutes the words 'if the owner,' &c., 'shall knowingly make an entry by means of any false invoice,' &c. I do not feel at liberty, when the legislature had left out the word 'fraudulent,' and inserted the word 'knowingly,' to reinstate the word 'fraudulent.' At the same time, I am bound to say, that I cannot conceive any case where an entry could be knowingly made by means of a false invoice unless it were fraudulently made. I do not tell you, in terms, that you are obliged to find that the entry was made fraudulently, but you are obliged to find that it was made knowingly, by means of a false invoice; and, for myself, I cannot imagine any case where it could be knowingly done, without being fraudulently done. What, then, shall we understand by this word 'knowingly,' as here employed? It is that, in making out this invoice, and in swearing before the consul that such was the actual market value of the goods, the claimant knew better, and that he was swearing falsely.

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He forfeits these goods, if you believe that he knew this invoice did not express their market value, their actual market value."

One of the earliest statutes of the United States uses language which is the true exposition of these laws upon this point. The eighty-fourth section of the Act of March 2d, 1799 (1 *U. S. Stat. at Large*, 694), in speaking of the forfeiture of goods under certain circumstances, provides, on the question of intent, that they shall not be forfeited where it is shown that the transaction took place "by mistake or accident, and not from any intention to defraud the revenue." That is the true distinction. Where an undervaluation is shown, unless it is shown to have occurred by mistake or accident, it follows inevitably that the undervaluation must have been made with intent to defraud the revenue. On that subject, I quote the words of a very learned judge, who adorned the bench for many years, and was particularly conversant with this class of cases—Judge Hopkinson, of the Pennsylvania District,—and who, in a prosecution of a similar kind (*United States v. 25 Cases of Cloths, Crabbe's R.*, 336, 401), gave the same view of the law that I have now given to you. He says: "Supposing that you shall find that these goods are undervalued in the invoices, how are you to decide upon the fraudulent intent or design? In doing this, you will be influenced by the extent of the undervaluation. Is it enough to have been a temptation to fraud? Could it, on a large business, afford a great profit? Does it run generally through all the invoices, or is it only an occasional undervaluation, that might have happened by accident, by mistake, without any design?" That shows the view of this learned judge as to the true test of this question of intent. Was it by accident or mistake, on the one hand, or by design on the other? If it was by design or intent, then it was not by accident or

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mistake. If it was by accident or mistake, then it was not with intent or design.

On this question of knowledge and intent, and only upon this question, there comes into this case the evidence which has been introduced on the part of the Government, whatever you may think it to be, growing out of the letter of Lacave & Echecopar to the United States consul at Cadiz, in March, 1864, the correspondence with Mr. Miln, comprising the letters and invoices about the price of the P. & A. wine, and the transactions, which have been commented upon on both sides, with Mr. Lenau and Mr. De Visser, and the one or two instances of wine sent to Mr. Barnard, in Boston, and perhaps some other matters that I have not borne in mind. But all those other instances, whatever they may be (whether the true view of them is as claimed by the Government, or as claimed by the defence), in regard to wine not under seizure, have nothing to do with this case, unless you shall find that there is an undervaluation, and shall come to the question of intent or knowledge.

It now becomes my duty, and, although a rather tedious one to you, it is, nevertheless, a duty that I owe to the case and to the parties, to go over, patiently and carefully, the requests to charge that have been made by the counsel on both sides. There are nine requests on the part of the Government, and thirty-one on the part of the claimants. I must ask you to bear with me, because it is a part of your duty, and of mine. As we have tried this case so far with patience and care, it is important that, in its closing hours at least, there should be no error or prejudice to either side, through negligence or haste.

The counsel for the Government ask me to charge the jury: "(1.) That, upon the evidence given by the claimants, the probable cause of condemnation has not been relieved, and the jury will find a verdict for the United

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States." Upon that I charge you, that the whole question is one for the jury, and one which I shall not take away from you.

The Government also asks me to charge: "(2.) That the sales upon orders, at \$1.10, deliverable upon the wharf in New York, are sales at Cadiz prices." That is a question for the jury, under the exposition of the law upon that subject, which I have stated to you, and I shall not take it from the jury.

"(3.) That the sales upon orders, at \$1.10, deliverable on the wharf in New York, are evidence upon which the jury may find the actual market price in Cadiz, by deducting therefrom freight, insurance, duties, and other custom house charges, and the expense of bringing the wine to the place of delivery." On that subject I have already charged you fully.

I have also charged you substantially in accordance with the fourth proposition on the part of the Government, which relates to this question of \$1.10.

The fifth proposition on the part of the Government also relates to the question of \$1.10, and is covered by what I have already stated to you on the subject.

The sixth proposition is this, and I charge you that it is law: "(6.) That if the wines under seizure were entered by means of invoices not truly expressing the market value of the wines at the time when, and in the country where, they were manufactured, with knowledge upon the part of the consignor, or of the consignee, that the invoices did not contain such actual market value, the goods are forfeited, and the jury must find for the United States."

So, also, I charge you that the seventh proposition on the part of the Government is correct: "(7.) That if the jury find, upon all the evidence, that the invoices do not contain such actual market value as aforesaid, and were made up by Lacave & Echeopar with intent to evade the payment of any part of the duties by law

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chargeable thereon, the goods are forfeited, and the jury will find for the United States."

The eighth proposition, also, I charge you is correct :  
“(8.) That the market value to which the manufacturer of wine is required to conform the valuation of his invoice, is of wine of the same grade and quality, as a general article of production and commerce in Spain, and that a manufacturer cannot escape the obligation to conform his invoice to that general market value, by the pretence or the fact that he does not offer his particular brand of wine in the market of Spain, but sends it in exportation ; but, in such case, the valuation in the invoice should be conformed to the market value in Spain of the same grade or quality of wine.” The only observation that I have to add upon that subject is in reference to that small portion of this wine, small in proportion to the rest, which has been called, throughout this trial, Burgundy Port. Some evidence has been given, on the part of the Government, in regard to the market value of that wine, and some evidence on the part of the claimants. Among the evidence given on the part of the claimants, and admitted by the court, in regard to the value of Burgundy Port in Spain, is the evidence as to its cost, and as to a fair manufacturer's profit on that cost, and as to what the sum total of the cost and manufacturer's profit is, with reference to the \$16. And, upon that subject I charge you, that you have a right to consider that evidence in regard to Burgundy Port, in arriving at the determination of the actual market value of the Burgundy Port in the market of Cadiz. But similar evidence was excluded by the court, and is not to be taken into consideration by you, upon the question of the actual market value of the sherries ; and, under the word “sherries” I include not only the Crown sherries, but the Madeiras and the P. & A. wines, and whatever else there may be in the case, except the Burgundy Port, which latter includes the wine called “pure juice.” As



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to this Burgundy Port, it is not sherry. It is all invoiced at \$16. It is sometimes marked "pure juice" on the margin of the invoices, and sometimes "Burgundy Port," but, in all cases, whether it is marked as "pure juice" on the margin, or "Burgundy Port" on the margin, it is, in the body of the invoice, called "Common Spanish Red Wine." It will be for the jury to judge, on the evidence, as to what this wine is, what is its quality, body, market value, appreciable worth, identity, and character.

The last proposition on the part of the Government is: "(9.) That, upon the evidence, the sales of the seventeen quarters and thirty octaves of wine, to M. Lenau & Co., and the three sales of wine to Simon De Visser, were actual sales in Cadiz, by Lacave & Echecopar, at the several prices paid therefor by the purchasers." On that subject I charge you, that it is a question entirely for you, and for your consideration only upon the question of knowledge or intent, after you shall have arrived at the conclusion, if you do arrive at it, that the wines are in fact invoiced at less than their actual market value.

I now take up the requests on the part of the claimants. The first proposition is correct, and I charge you in accordance with it: "(1.) There are two questions of fact to be considered: 1st. Were these wines undervalued by Lacave & Echecopar? 2d. Had they a guilty knowledge that they were undervalued? Before these goods can be condemned, both of these questions must be answered in the affirmative. There must be a guilty undervaluation." On that subject I will read to you what was said by the Supreme Court of the United States, in the same Champagne case from California: "The term *knowingly*, in the Act of 1863, in the connection here under consideration, refers to the guilty knowledge of the owner, consignee, or agent by whom the entry is made, or attempted to be made. The offence

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to be punished consists of three particulars: (1.) The making, or attempting to make, an entry by the owner, consignee or agent; (2.) The use, by such owner, consignee, or agent, of the forbidden means; (3.) Guilty knowledge on the part of such owner, consignee, or agent. This, we think, is the proper construction." Now, the Supreme Court have given no definition, nor does the request to charge, which I have complied with, give any definition of the words "guilty knowledge." But "guilty knowledge," under the circumstances of the case, means no more than "knowledge." If the party knew better, if he knew that the invoice value was lower than the real value, or if he put in a lower value with the intent to evade or defraud the revenue, then his knowledge and intent were guilty.

The second request on the part of the claimants has, in my judgment, nothing to do with this case, and I decline to give it.

The third request is correct; and I charge you in accordance with it, subject to the remarks I have heretofore made in respect to the question of \$1.10: "(3.) The law requires the actual market value in Cadiz to be stated in the invoice, and the jury must disregard all evidence of sales and prices and profits here, or elsewhere, except in Spain." That is true. All prices, everywhere, except in Spain, are to be disregarded, and it is only in case you find that the \$1.10 was really a price in Spain, that it is to be taken into consideration. Otherwise, it is to be thrown out of view; and, therefore, in any event, the prices that you are to consider are to be prices in Spain, and you are not to consider the \$1.10 price at all, unless you find that it is a price in Spain.

As to the fourth, fifth, sixth, and seventh requests of the claimants, they relate to the official papers in this case, the certificates of the consul, the appraisements, the reappraisements, and the acts of the custom house offi-

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cers, and I decline to charge as requested by these prayers. But I charge that you may take into consideration, as a part of the evidence in the case upon the question of market value, as it shall affect either side, the invoice, the entry, the certificate of the consul, the oath of Mr. Lacave, the oath of Mr. Miln on the entry, the appraisement by the appraisers, the certificate of the appraisers on the invoice as to the value, the examination made by the appraisers, the testimony given before the appraisers, and the entire record of the appraisement and of the reappraisement, every thing there is in the official papers respecting the appraisement and the reappraisement. You may take all this into consideration, as a part of the evidence, on the question of fact as to the market value of the wines in Cadiz.

In regard to the eighth request to charge, I decline to charge as there requested. I have already stated to you, in respect to the question of Burgundy Port, all that there is on that subject in the eighth request, that is, in my judgment, relevant to the case.

I decline to charge as requested in the ninth, tenth, and eleventh prayers of the claimants.

The twelfth prayer is correct, and I charge you in accordance with it, subject to the remarks I have already made in regard to the question of the \$1.10: "(12.) That the revenue laws of the United States do not assume to dictate under what conditions a foreign manufacturer shall dispose of his property, nor to what countries it shall be shipped. It was perfectly proper for the claimants in this case, if they saw fit, to refuse to sell their wines in Spain, but it was nevertheless their duty to state, in their invoices, the actual market value thereof in Spain, and it is the duty of the jury to determine, from all the evidence, if that invoice value was correct and true." That is a sound proposition, subject to the remarks I have made in regard to the \$1.10 price, and to the question whether it was a cover or not.

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I decline to charge in accordance with the thirteenth, fourteenth, fifteenth, and sixteenth prayers.

The seventeenth prayer is correct, and I charge you in accordance with it: "(17.) It being admitted by the Government and the claimants that all the wines under seizure left Spain for New York the property of Lacave & Echecopar, who obtained them by manufacture, the invoices accompanying the same are required by law to contain the actual market value of the merchandise at the time and place of manufacture."

I also charge you in accordance with the eighteenth prayer: "(18.) That it is the duty of the jury to ascertain, first, the time and place of manufacture; next, the market value of the wines under seizure, as an article of commerce, at such time and place; and, then, whether the prices stated in the invoices presented at the Custom House conform to such market value."

The nineteenth proposition comes back again to the \$1.10, and I charge you that it is correct, subject to the remarks I have already made on the subject: "(19.) That if the jury find that the prices stated in the invoices do conform to the market value of the merchandise as an article of commerce at the time and in the country of manufacture, then it is immaterial what may be the ultimate actual receipts of the shippers, upon sales of the wines delivered in New York free of all costs and charges; because, the revenue law only contemplates, in respect to invoice value, transactions of purchase and sale in the market of Spain." That, as I have stated before, is true; and, unless the \$1.10 price shall be found by you, upon your view of all the facts in regard to it—the \$1.10 upon order sales—to be referable to the market of Spain, then it has nothing to do with the case, and how much money went back to the pockets of Lacave & Echecopar is immaterial.

The twentieth proposition is also correct, and I charge you in accordance with it: "(20.) That if the jury find

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that any of the wines under seizure, or similar wines of Lacave & Echeopar, were not sold in the market of the place of manufacture, or subjects of general commerce there, then they are at liberty to consider the value, at the same time and place, of the wines of other houses or manufacturers, of similar grade, quality, and character, in order to ascertain the correctness of the invoices in controversy; and, if there be no such similar wines, then the sum which it cost Lacave & Echeopar to produce the wines under seizure, with a fair manufacturer's profit added." That comes back again to what we have had so often, in the course of this trial, that, if there is no evidence as to the market value of these wines, or of wines of a similar grade and quality, derived from actual sales of them, or transactions in regard to them, then you are at liberty to resort to the cost, with a fair manufacturer's profit added, but only in such case.

The twenty-first proposition is correct, and I charge in accordance with it: "(21.) That, if the jury believe that the parcels of wine marked P & A 1 and P & A 2 were invoiced at their real value in the actual markets of the place, and at the time, of manufacture, then neither they, nor the invoice containing them, is liable to condemnation; and the statement of higher prices sent to Miln is of no consequence in this case, unless the jury shall believe that the prices mentioned are not mere *pro forma* prices on which to effect sales in New York, but the actual market price in Cadiz." It is only as evidence of actual market price in Cadiz that that transaction, that letter, that statement, that paper or invoice, whatever it may be, is introduced into the case by the Government; and, if it shall be thought by you, upon all the facts, not to indicate any thing in regard to the actual market value in Cadiz, it has nothing to do with the case.

The twenty-second proposition is also correct, and I charge you in accordance with it: "(22.) That, until the

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jury find that the wines under seizure were invoiced at less than their actual market value at the time and place of their manufacture, they cannot take into consideration any evidence in the case respecting (1) the Mansanilla octave; (2) the Barnard cask of sherry; or (3) the De Visser transaction." I have already stated to you that these three things only bear upon the question of knowledge and intent, after you shall have found that there was, in fact, an undervaluation.

The twenty-third proposition is incorrect, and I decline to charge it.

The twenty-fourth proposition is correct, and I charge you accordingly: "(24.) If the house of Lacave & Eche copar believed that the letters, purporting to be signed by Samuel D. Jones, contained a regular mercantile proposition for a purchase of their Crown sherry wines, and if the house of Lacave & Eche copar answered this proposition, and fixed certain prices as those for which they would sell the same for export, then you are at liberty to infer that they would have sold the same wines to any body at the prices named, and also to infer that there was a market value thus made and fixed by the house of Lacave & Eche copar itself, and that such market value was as low as the price thus fixed, after deducting therefrom the cost of removing said wines from Cadiz, and placing them on board vessels in that port, for transportation to New York."

The twenty-fifth proposition is also correct: "(25.) The court is also requested to charge that substantially the same remarks and instruction as last above given, are also applicable to the letters to and from the house of J. Bensusan & Co., and to the prices named by them for the said wine." The substance of the last two propositions is, that if Lacave & Eche copar and Bensusan & Co. believed that these were real *bona fide* applications, and if their offers were real and *bona fide*, then you are to take them into consideration as part of the evidence on market value.

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The twenty-sixth proposition I decline to charge, as it is a question of fact solely for the jury. That is, it is a question of fact for you, whether the houses of Lacave & Eche copar, and of J. Bensusan & Co., when they respectively answered the propositions contained in these letters, believed that the same were real proposals for the purchase of wines by a person desirous of buying them for exportation to Canada. That is a question of fact for you. I am asked to charge you one way or the other on it, as a question of law, which I decline to do.

The twenty-seventh proposition is correct, and I charge you in accordance with it: “(27.) If the house of Lacave & Eche copar, and of J. Bensusan & Co., supposed, in answering the letters purporting to be signed by Samuel D. Jones, that they were written by a person who wished to become a customer, in the ordinary way of trade, and if, in reply, they named their prices for cash, for export, for considerable quantities of said wines, it does not detract a particle from the value of the evidence, as evidence of market value in Cadiz, that neither Jones nor Farwell, in fact, intended to buy, and that the letters written in the name of said Jones were, in fact, written to obtain evidence to be used for the United States; because, the test to be applied is the state of mind of Lacave & Eche copar, and of J. Bensusan & Co., at the times respectively when they wrote the letters stating prices, in reply to those purporting to come from the said Jones.”

The twenty-eighth proposition is, that the evidence of the witnesses Henshaw and Marshall, and the general credit to be given to their testimony, on your view of their examination and cross-examination, is left entirely to you, and of all this you are the exclusive judges. That, undoubtedly, is true, and I charge you in accordance with it.

The twenty-ninth proposition is correct: “(29.) That, if the jury shall find, under instructions from the court

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in matters of law, or in any other way, that the invoice valuations of the wines under seizure did not conform to the value of such wines in the actual markets of the country of production, as required by the revenue laws of the United States, still they cannot return a verdict for the Government, unless they shall also find that such discrepancy was not the result of honest error on the part of the manufacturers, in respect to matters of law or fact, but was made knowingly, with guilty knowledge, with design to evade the payment of duty which they knew was legally chargeable on the merchandise." I have already charged you substantially to that effect, and have explained the meaning of the words, "knowledge," "guilty knowledge," "design to evade the payment of duty," "honest error," and all the other expressions used in the request.

The thirtieth request is: "(30.) That the jury cannot, for the purpose of ascertaining the market value in Cadiz of these wines, consider the sum for which they were insured in the city of New York, by the direction of Lacave & Echeconpar." I charge you upon that subject, that, if you shall find, upon the evidence, that this \$1.10 price, on order sales, was a mode of business adopted for the purpose of concealing the real prices of the wines at Cadiz, and therefore shall find that the \$1.10 was a Cadiz price, less the proper deductions, then you may take into consideration, for the purpose of ascertaining the market value, this question of insurance, but not otherwise. If you find that the \$1.10 on these order sales was not a Cadiz price, but was entirely a New York price, then the insurance has nothing to do with the case; otherwise, it has. And, on the subject of insurance, you will recollect the views that were presented to you by the counsel on both sides, in case you shall, under the instructions of the court, find it to be a proper element in the case.

The thirty-first request I decline to charge. It is substantially to the effect (and I state it because it is neces-



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sary to make some remarks upon one expression in it), that the De Visser transaction, the Mansanilla and Barnard transactions, and other transactions in which duties were to be paid by persons in this country upon wines sent, having been introduced in evidence by the Government for the purpose of showing *intent*, are entitled to little or no weight for that purpose, because Lacave & Echeopar had no motive to undervalue the wines. Now, gentlemen, this is a question wholly for you ; and, upon this question of motive, which has been argued to you by the counsel for the claimants and by the counsel for the Government, as affecting these wines involved in the De Visser, the Barnard, the Lenau and other transactions, the language of the statute of the United States (the Act of 1830) is, that these things are not allowed to be done with the intent to evade or defraud the revenue. It is just as much an offence against the law for a man to violate it with an intent to *evade* the revenue in any way, as it is to do so with an intent to *defraud* the revenue. But the question of motive is one entirely of fact for you to consider, upon all the evidence in the case.

That disposes of the requests to charge on both sides, and now it is my duty to call your attention to two or three other points in the case, and then I will commit it to your consideration.

It was urged to the court, early in the trial, and overruled by the court, and it has been urged, in summing up, to you, by the counsel for the claimants, with very great earnestness, that great weight is to be given to the fact of the appraisement and reappraisement of these wines, by the custom house, at the price of \$16. The court was asked to lay down the law to be, that this appraisement was conclusive ; that it ended the question between these parties ; that it not merely went to establish the proper rate of duty, but that it condoned any offence ; that it was a pardon of any offence that had

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been committed ; that it was a flat bar to any prosecution by the Government to forfeit these goods for any fraud that had been committed. Now, gentlemen, such is not the law. The law has been held the other way ever since the earliest revenue law was enacted, time and time again, by all the courts that have ever considered the question, and, according to my apprehension, there is not a decision the other way. The cases on this subject all draw this distinction—and it is one as perfectly appreciable by you as it is by a lawyer—that this appraisement and reappraisement, and all this machinery which you have seen spread out upon the papers here, is for the purpose of getting at the duty, and for no other object. It is to find out the duty. It is a mode of litigation between the parties, the Government on the one side and the importer on the other, to find out how much duty is to be paid on the goods ; and, when that machinery is carried through by appraisement and reappraisement, and the duties are paid, and the merchandise is delivered, that transaction is settled, so far as the duties are concerned, and the Government, afterwards, even though they find that there has been a mistake, cannot recover from any one, by a lien on the goods or by a suit against the individual, any more duty. It is conclusive upon that subject, but only upon that subject. It is not conclusive if a fraud has been committed. It does not condone or pardon any fraud that has been committed by any false invoice, or any knowing, intentional, wilful undervaluation. A forfeiture for fraud can be enforced after appraisement, reappraisement, payment of duty, and delivery of the goods. The appraisement system is for all cases, and ordinarily presupposes an honest invoice, but a mistaken one, and a payment of too little duty. This subject came up before the same learned judge, Judge Hopkinson, in the case from which I have already cited, in 1840 (*Crabbe's R.*, 356), on a seizure of twenty-five cases of cloth. The same ground was taken

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there, first to the court, as a question of law, and then to the jury, and the judge disposed of it in this way. He says (page 369), "To invoice the goods below their actual value and cost, and to enter them by that invoice, with design to evade the duties, is, *per se*, an offence which forfeits them, whether the invoice was afterward instrumental in the estimation of the duties for that purpose or not. The evidence must follow the issue, and must depend upon the fact to be proved. When the question is whether an importer has paid the duties legally chargeable upon his goods"—and that is not the question in a case of seizure—"it may be enough for him to say, I have paid all that the officers of the Government appointed to ascertain them declared to be due, and the question should rest. But, when the inquiry is whether he has been guilty of a specific fraud or not, it would be extraordinary if the acts or opinions of men in reference to another subject, should be conclusive, either for his condemnation or acquittal." And such is the law. If it had so happened in this case, upon appraisement and reappraisement, that these goods here invoiced at \$16 the quarter cask, had been appraised at \$25, then, upon the theory of the claimants, the Government could have insisted that that was conclusive evidence against the claimants, and that the claimants could not be permitted, on this trial, to show that the value was not \$25, but was really no greater than \$16. The law says, that this appraisement and reappraisement are not conclusive on either side. If they are higher than the invoice, they do not bind the claimant upon the question of seizure. If they are equal to or lower than the invoice, they do not bind the Government. This is fair for both sides. But, still farther on in the same case, when Judge Hopkinson came to charge the jury, the matter was pressed on his attention again, and the learned judge says (page 375): "It is contended that, as these goods were appraised at the custom house in New York at the invoice prices,

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that, as they were passed through that custom house on that appraisement, paid the duties according to that appraisement, and were thereupon delivered to the importers, they are now exempted from all further inquiry into their cost or value, not only in relation to the amount of duties legally chargeable on them, but on a prosecution for fraud in making up those invoices, and on any or every other account; that the very fraud by which it is alleged, in this prosecution, the passing of the goods through the custom house was obtained, that is, the false invoices, cannot now be inquired into. I can by no means assent to this doctrine, which, in my judgment, would be to offer a premium for successful fraud, and punishment only to the unskilful. I adhere, on reflection, to the opinion I gave on the trial. I will add but a remark. It is said these officers are the appointed agents of the Government, and that the Government is bound by their acts. The answer is plain. The Government does not claim any right or privilege for itself that every citizen does not possess. Suppose one of you should appoint an agent to sell your house or goods, with even more clear and full powers than those given to the appraiser by the Acts of Congress. Your agent makes a sale, but it is afterward proved that he has been grossly defrauded by the purchaser, by false representations, by the suppression of the truth, by that which constitutes fraud in the law. Would you suppose you are bound by such a transaction—that the cheat is safe, and may retain your property only by saying that it was delivered to him by your agent?"

I have deemed it my duty, gentlemen, to make these remarks, because of the very earnest manner in which considerations growing out of the appraisement and reappraisement at \$16, were pressed upon your attention. So, also, a great many remarks were made, in summing up and in the course of the trial, in reference to the laws on the subject of the seizure of goods, the employment

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of informers, and the seizure of books and papers, none of which questions have any thing to do with this case; and the fact that they have nothing to do with this case is manifest from the fact that, in the thirty-one prayers for instruction, upon the part of the claimants, there is not one which touches any one of these subjects. They have nothing to do with the case. From the year 1793 to the present time—a period of seventy-five years—the law has stood, that the collector, and other officers of the revenue, on mere suspicion, may enter into a vessel and search it, and seize the goods and hold them on suspicion of fraud upon the revenue. So, in the act of 1799, section sixty-six, if the collector suspects that goods are not invoiced properly, he may take possession of them. By section sixty-seven, on suspicion of fraud, he may open the goods. By section sixty-eight, he may search suspected places for goods. That has been the policy of the law from the commencement. Fraud could never be prevented or detected but for this high power, which is the prerogative of the sovereign authority of the Government, and which is for your protection, and for my protection, and for the protection of every man who wishes to do an honest business, and not to be driven out of it by parties who may commit frauds upon the Government. So, also, ever since the act of 1799, the system of informers has been sanctioned; and, by section ninety-one of the Act, one-fourth of the proceeds of a seizure is given to the informer. That law still remains in force, and various laws enacted since, both in regard to customs and internal revenue, all sanction the employment of informers, and give them a share of the proceeds of the property seized. And, more recently, by other acts, additional powers, which must have been conferred for good purposes and from good motives, and, as we must presume, upon sufficient cause, were conferred in certain cases, and under certain restrictions, to seize the books and papers of parties suspected of being concerned

in frauds upon the revenue. Therefore, gentlemen, that is the policy of the law, and it is not to be inveighed against, to influence your minds. It is a part of the law which you are called upon to administer ; and, to address to you considerations based upon prejudice against the informer in a case, or prejudice against the seizure of goods, or of books and papers, is to ask you to take into consideration things which, under your oaths, and under the law as given to you by the court, you have no right to consider, which have no relevancy to the case, and which you have no right to permit in any manner to influence your judgment. You are to consider and decide this case fairly, upon the evidence addressed to the true merits and issues in the cause, which I have explained to you as clearly as it is in my power to do.

There is but one more remark I have to make to you, and that is in reference to the question of the burden of proof. It has been the law upon that subject since the year 1799, enacted by a Congress and sanctioned by a President who had to do with the formation of the Constitution, and with the creation of our present system of government, and it has remained the law on that subject until the present time, and it was asserted and affirmed no longer ago than December, 1865, by the Supreme Court of the United States, in the case of *Cliquot's Champagne*, which I have already cited, where the court say : "It is argued that the rule relating to probable cause and the *onus probandi*, prescribed in the seventy-first section of the Act of 1799, is confined to prosecutions under that Act, and has no application to those under the Act of 1863, which is silent upon the subject. It would be a singular result, if, in a prosecution upon an information containing counts upon this and later statutes *in pari materia*, the rule should apply to a part of the counts and not to others. The seventieth and seventy-first sections must be construed together. They both look to future and further legislation. In all the

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changes which the revenue laws have undergone, neither has been repealed. The authority to seize out of the district of the seizing officer, and this rule of *onus probandi*, have always been regarded as permanent features of the revenue system of the country." And they affirm the charge of the learned district judge, and his refusal to charge as requested by the claimants in that case, that the burden of proof was not upon the claimants, but was upon the prosecution. Now the law upon that subject is this—that where probable cause is shown for the prosecution (and, in this case and in all cases it is for the court to decide whether probable cause is shown for the prosecution, and the court decides that there is such probable cause by throwing the claimants upon their defence, as it did in this case),—where probable cause is shown for the prosecution, the burden of proof is thrown upon the claimants to dispel the suspicion, and to explain the circumstances which seem to render it probable there has been a knowing undervaluation. The Government, in this case, having established probable cause, it is for the claimants to show their innocence, and dispel and clear up the suspicion which the Government, in the beginning, raised against them. Under this rule, it is for you to say, whether the claimants have made out their defence, and have shown that these wines were invoiced at a value as high as their actual market value in Cadiz at the time they were manufactured, or that the failure to so invoice them was the result of accident or mistake, and not of knowledge or intent. If they have not shown that, you will find for the United States, and, if they have shown that, you will find for the claimants.

As I stated before, there are two counts in this information for your consideration—one under the fourth section of the Act of 1830, which requires that the offence shall have been committed with intent to evade or defraud the revenue, and the other under the first section of the Act of 1863, which requires that the party shall

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In the Matter of The Washington Marine Ins. Co., an Involuntary Bankrupt.

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have knowingly made, or attempted to make, an entry by a false invoice, or other false paper. Under the Act of 1830, you must find, in order to find against the claimants and in favor of the Government, that the invoices were made up with intent, by false valuations, to defraud the Government, and, unless, under that Act, you so find, the goods cannot be forfeited. Under the Act of 1863, the goods cannot be forfeited, unless you find that the entry, or attempt to make the entry, was done knowingly. You can find for the Government under either statute, that is, under the counts of the libel under either statute. You may find under the law of 1830, or under the law of 1863. If you find against the claimants under either, the goods are to be forfeited. You must find in favor of the claimants under both, to find a verdict in their favor.

With these observations, I leave the case to your patient and attentive consideration.

The jury then retired. After being in consultation for twenty-four hours, they came again into court, and, upon stating their inability to agree upon a verdict, were discharged.

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MARCH, 1868.

IN THE MATTER OF THE WASHINGTON MARINE INSURANCE COMPANY, AN INVOLUNTARY BANKRUPT.

CORPORATION.—DISSOLUTION.—SERVICE.

Where a corporation was organized under the laws of the State of New York, and, in a proceeding instituted by the Attorney General of the State, and restraining the company and its officers from exercising any of its corporate powers, was declared insolvent, and an order dissolving it and appointing a receiver was made by the Supreme Court of the State, and the receiver took possession of



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**In the Matter of The Washington Marine Ins. Co., an Involuntary Bankrupt.**

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the property of the company, and thereupon a petition in involuntary bankruptcy was filed:

*Held*, That the service of the order to show cause must be made by publication. That the company had suffered its property to be taken on legal process, with intent to defeat the operation of the Bankruptcy Act.

This was a proceeding in involuntary bankruptcy, against The Washington Marine Insurance Company, a corporation, incorporated under the laws of the State of New York. On the 26th of October, 1867, upon the petition of the Attorney General of the State of New York, the Supreme Court of the State of New York, for the city and county of New York, made an order dissolving the company, and appointed Cornelius K. Garrison receiver, and restraining the company and all its officers and agents from exercising any of the corporate powers or franchises of the company, and from disposing of any of its property and effects except to the said receiver. Under this order, the said receiver took possession of the office, books, and property of the company on the same day, and thereafter continued in possession of them, and had done various acts in the winding up of its affairs. On the 9th of March, 1868, a petition for adjudication of bankruptcy was filed in this court against the company, by the Ocean Insurance Company of Portland, Me., alleging, as the act of bankruptcy, that the Washington Company had suffered its property to be taken on legal process with intent to defeat the operation of the Bankruptcy Act, and showing, by depositions, that the Washington Company had suffered all of its property to be taken possession of under the order appointing a receiver. Upon the petition, an order was granted by this court requiring the Washington Company and the receiver to show cause why the company should not be adjudged bankrupt, and ordering that service of the petition and order be made upon the officers of the company and the receiver. The order was returnable on the 15th of March, on which day the usual proof of service was made.

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The Schooner General Sheridan.

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The court (BLATCHFORD, J.), held, after argument on the part of the petitioning creditors and the receiver, that the Bankruptcy Act applied to the case of the Washington Marine Insurance Company, but that it was a case where the debtor proceeded against could not be found on account of the dissolution. Service of the order to show cause was, therefore, ordered to be made by publication, and the return day was adjourned to the 21st of March. On that day, on due proof of service of the order to show cause by publication, and in default of an appearance by the company, the court declared the Washington Marine Insurance Company bankrupt, and issued process accordingly.

For the Ocean Insurance Company, petitioning creditor, *F. C. Nye* and *T. A. Jenckes*.

For the receiver, *E. R. Meade*, *W. F. Allen*, and *C. A. Seward*.

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MARCH, 1868.

## THE SCHOONER GENERAL SHERIDAN.

## BREACH OF CHARTER.—LIEN ON VESSEL.—CHARTER NOT BEGUN.

Where a vessel was chartered in New York, for a voyage from ports in Florida to New York, and did not go to any of the ports of loading named, but returned to New York without having entered on the performance of the charter, the charter party containing a clause whereby the parties bound the vessel and the merchandise to be laden on board, each to the other, for the faithful performance of the covenants therein contained:

*Held*, That an action *in rem* against the vessel, to recover the damages occasioned to the charterer by this breach of the charter, would not lie, and that the libel must be dismissed.

Under such a charter, any duty that may be violated by the owner or master before the cargo is put on board, is not a duty of the vessel, or one for the breach of which a lien on the vessel is created or can be enforced.

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The Schooner General Sheridan.

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On the 19th of March, 1867, the schooner General Sheridan was chartered to Eberhard Faber, by a written charter party entered into at New York. The vessel was then at sea, and the charter was for a voyage from one or more of several named places of loading on the west coast of Florida to New York. Faber afterward filed his libel against the vessel *in rem*, alleging a breach of the charter, in that the vessel did not, as she was required to do by the charter party, proceed to any of the ports of loading therein mentioned, or give notice of her readiness to receive cargo, or take any cargo, but returned to New York without having fulfilled any of the stipulations of the charter party. He claimed damages for such breach to the amount of \$5,000, and alleged, that, by a clause in the charter, it was agreed by the parties that the vessel should be bound for the faithful performance of the charter. The claimants excepted to the libel, on the ground that the facts set forth in it did not constitute any lien on the vessel, and were not within the jurisdiction of this court, or enforceable in admiralty.

For libellant, *G. De Forest Lord*.

For claimants, *Beebe, Dean & Donohue*.

BLATCHFORD, J.—Authority can be found for maintaining the libel in this case. Thus, in the case of *The Pacific* (1 *Blatchf. C. C. R.*, 569, 586), decided in 1850, Mr. Justice Nelson, in the Circuit Court for this district, says, that it is not necessary, in order to give jurisdiction to the admiralty *in rem*, in the case of a contract, maritime in its nature and object, that the vessel should have entered upon the performance, and that the breach should have occurred in the course of the voyage; and that, if the vessel refuses to receive the cargo on board, when it is at her side ready to be delivered, she is bound, and the party aggrieved is not

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The Schooner General Sheridan.

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obliged to look exclusively to the master or owner. But later cases have overruled this view. In the case of *The Schooner Freeman v. Buckingham* (18 *Howard*, 182), decided by the Supreme Court at the December Term, 1855, Mr. Justice Curtis, delivering the opinion of the court, says: "Under the maritime law of the United States, the vessel is bound to the cargo, and the cargo to the vessel, for the performance of a contract of affreightment. But the law creates no lien on a vessel as a security for the performance of a contract to transport cargo, until some lawful contract of affreightment is made, and a cargo shipped under it." In the case of *Vandewater v. Mills* (19 *Howard*, 82), decided by the Supreme Court at the December Term, 1856, Mr. Justice Grier, delivering the opinion of the court, says: "If the master or owner refuses to perform his contract, or, for any other reason, the ship does not receive cargo and depart on her voyage according to contract, the charterer has no privilege or maritime lien on the ship for such breach of the contract by the owners, but must resort to his personal action for damages, as in other cases." This view was applied by this court in July, 1857, in the case of *Reed v. The Telos*; and in May, 1860, in the case of *Torrices v. The Winged Racer*. It is true that, in *Vandewater v. Mills*, the court says that it was no part of the written agreement sued on in that case, that the vessel libelled *in rem* therein should be hypothecated as security for the performance of the agreement; and, it is urged on the part of the libellant in this case, that the doctrine laid down in *Vandewater v. Mills* is not applicable to this case, for the reason that by the charter party in this case, there is an express hypothecation of the vessel. The libel avers that "the parties to the said charter party did also therein and thereby bind themselves, their executors, administrators, and assigns, and the said vessel, freight, tackle, and appurtenances, and the merchandise to be laden on

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The Schooner General Sheridan.

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board, each to the other, for the true and faithful performance of all the covenants and agreements therein contained, in the penal sum of the estimated amount of the said charter." This is the usual penal clause inserted in charter parties (*Maclachlan on Merchant Shipping, chap. 8, page 334*). It is founded on the rule of maritime law stated by Cleirac (597): "Le batel est obligée à la marchandise et la marchandise au batel;" and by Valin (1 *Valin, Ordon. de Mar., b. 3, tit. 1, art. 11*): "The ship, with her tackle, the freight, and the cargo, are respectively bound by the covenants of the charter party." The express covenant in this charter party binding the vessel to the merchandise to be laden on board, and the merchandise to be laden on board to the vessel, must be construed conformably to the principles of the maritime law, and imports nothing more than would have been held, according to those principles, to be a part of the contract, if the express covenant had not been contained in the instrument. The obligations of the vessel to the merchandise to be laden on board, and of the merchandise to be laden on board to the vessel, are mutual and reciprocal. Under the covenant, the duty of the vessel, to the performance of which the hypothecation binds her, is to deliver the cargo that may be put on board at the time and place stipulated for such delivery. Any duty that may be violated by the owner or master, before the cargo is put on board, is not a duty of the vessel, or one for the breach of which a lien on the vessel is created or can be enforced. So, too, under the covenant, if the cargo is not laden on board, it is not bound to the vessel, and, therefore, the vessel cannot be in default, though the master or owner may be, for the nondelivery of the cargo. To hold that the vessel was bound to the merchandise to be laden on board, when there was no merchandise laden on board, would be to depart from the express terms of the covenant, and to destroy the mutual and reciprocal character of the obligations of the covenant.

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The Schooner General Sheridan.

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This view of the covenant in the charter party is sustained by the opinion of the Circuit Court for this district, in the case of *The Hermitage* (4 *Blatchf. C. C. R.*, 474). The charter party in that case contained a clause, whereby, for the fulfilment of the several stipulations of the charter party, each party bound himself to the other—the one, the vessel, freight, and tackle; the other, the merchandise to be laden on board. The charterers put some cargo on board, and then a dispute arose as to some of the provisions of the charter party, whereupon the charterers commenced taking out the cargo, and refused to go on with the charter party. The libellant filed a libel *in rem* against the cargo, to recover freight, according to the charter party, for the time the vessel was used by the charterers, and damages for the non-fulfilment by them of the charter party. The District Court, on exceptions filed to the libel, dismissed it, on the ground that the suit *in rem* would not lie. On appeal by the libellant, the Circuit Court (Mr. Justice Nelson) reversed the decree of the District Court, and sustained the libel, on the express ground that the cargo had been put on board, and the voyage had, in fact, commenced according to the terms of the charter party, and that the lien on the cargo attached as soon as it was laden on board; and that, so far as the form of remedy was concerned, the case stood in the same position as if the voyage had been broken up by the charterers at any other point in the course of it. And he added: "This case does not fall within that class of cases where nothing has been done under the charter of the vessel, that is, where no goods have been placed on board, and the voyage has not been entered upon; in which cases there can be no lien upon the vessel or cargo under the charter party. In such cases, whether the breach of the agreement is on the part of the owner or of the charterer, there can be no proceeding *in rem* against the vessel or the cargo, as no lien has attached

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The Steamer Hansa.

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for the benefit of either party." These views are decisive as to the present case. They indicate that the doctrine of the case of *The Pacific* must have been considered by Mr. Justice Nelson himself as unsound, probably in view of the opinion of the Supreme Court in the case of *Vandewater v. Mills*.

The exceptions are allowed, and the libel is dismissed, with costs.

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MARCH, 1868.

## THE STEAMER HANSA.

COLLISION IN NEW YORK HARBOR.—STEAM VESSELS CROSSING.—  
LOOKOUT.

Where a steamer was coming into New York harbor from the sea, in the day-time, having on her starboard hand a steam vessel, built for a floating grain elevator, which was crossing her path, and the latter kept her course, but was struck by the steamer, and the steamer claimed that there were vessels at anchor which prevented her from going under the stern of the elevator, the steamer's lookout having seen the latter, but not having reported her for the reason that, as he supposed, the captain and pilot, who were on the bridge, saw her:

*Held*, That, as the vessels were crossing, it was the duty of the steamer, having the elevator on the starboard side, to keep out of the way. That the failure of the lookout to report the elevator, when he saw her, was negligence.

That, as the steamer did not pretend that she was baffled or misled by any movement on the part of the other vessel, and her only mode of keeping out of the way of the latter was to go under her stern, she must prove that, at no time after she was first near enough to have discovered the latter, could she have ported, and thus avoided the collision.

That it was not proved that the steamer entered among the crowd of vessels before she ought to have discovered the elevator.

**SHIPMAN, J.** This is a suit to recover damages for a collision between the steamer *Hansa* and the elevator *Transporter*, owned by Stephen K. Lane the libellant. The former is a large sea-going steamer, running between

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The Steamer Hansa.

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New York and Bremen, and the latter is a small steam vessel, having a tower or elevator on deck, and used about the harbor of New York for the purpose of transferring grain in bulk. The collision occurred between five and six o'clock, in the afternoon of the 13th of March, 1865, in the Hudson river, opposite New York City, and near the New Jersey shore.

The Hansa was just in from sea, and bound to her dock at Hoboken. The Transporter was crossing the river from New York to the coal docks at Jersey City. The Hansa was in charge of a pilot, and had a lookout stationed on her forecastle. This lookout says he first saw the Transporter three or four points on the starboard bow of the Hansa, crossing the river, and that this might have been eight or ten minutes before collision. He states that he did not report her, because he supposed the captain and pilot of the Hansa, who were on the bridge at the time, saw her. He also says that the Hansa blew her whistle to the Transporter, but whether before or after he first saw her, he cannot say. Both he and Harrow, the pilot of the Hansa, say that the Transporter did not change her course till at or about the time of the collision. The captain of the Hansa fixes the distance apart of the vessels, when he first saw the Transporter, at a half a mile, and says that the pilot saw her at the same time. The pilot thinks she might have been three, four, or five lengths of the Hansa off when he first discovered her. The captain of the Hansa says that he feared a collision when he saw the Transporter, and commenced blowing his whistle. Newman, the third officer of the Hansa, says that when he first heard the whistle blow, the Transporter was about a length and a half (of Hansa) on her starboard bow, ahead of her, and coming at right angles. From the whole evidence presented on the part of the Hansa, she must have been moving at a speed of six or seven knots just before the collision. The Transporter was bound from pier 1, on the New



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The Steamer *Hansa*.

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York side, to the coal docks at Jersey City, and was moving at not more than half the speed of the *Hansa*. As the tide was ebb she headed, as she neared the west shore, a little up the river. It was broad daylight, and there can be no doubt that the *Hansa* could have discovered the *Transporter* early enough to have taken decisive measures to clear her, unless she was in some way embarrassed in her movements. The vessels were crossing under circumstances which bring them directly within the rule laid down in the fourteenth article of the statute for preventing collisions, which provides that "if two ships, under steam, are crossing each other, so as to involve risk of collision, the ship which has the other on her starboard side shall keep out of the way of the other." The *Hansa* had the *Transporter* on her starboard side, from a point a long distance below where the collision took place, and at which it was clearly her duty to have discovered her, whether she did in fact or not, and to have gone to starboard of her, unless prevented by circumstances over which she had no control. This was her duty, imperatively fixed by statute. The burden of proof is on her to show that she was prevented from conforming to the rule by circumstances beyond her control. The only important excuse which she offers is, that the river was full of vessels at anchor, which rendered her navigation difficult. On this point the evidence is conflicting as to the number and location of the anchored vessels in that section of the river passed over by the *Hansa*, between the time she actually discovered the *Transporter* and the moment of collision. The witnesses for the libellants testify, that the great bulk of the anchored fleet lay along within three hundred yards of the Jersey shore, while the river to the eastward was comparatively clear. The witnesses for the *Hansa*, who testify on this point, insist that the anchored vessels extended across the river to Castle Garden. Captain Von Santen says he could not have ported his helm (as

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The Steamer Hansa.

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he would have had to do to have gone to starboard, and astern of the Transporter), because he should have run foul of other vessels, and that vessels were at anchor clear across the river to Castle Garden. This may be true after he entered the anchored fleet, though I am inclined to the opinion, upon the whole evidence, that the vessels at anchor were much more numerous near the Jersey shore, along the route which the Hansa took, than in the middle of the river and to eastward. But the difficulty in this part of the defence is, that the proof fails to show that the Hansa entered among this dense fleet, before she reached the point where she might and ought to have discovered the Transporter. She is seeking to exonerate herself from the charge of having violated a fixed and well-known rule of navigation. She does not pretend that she was baffled or misled by varying movements of the Transporter. Her witnesses say that the latter held her course. The Hansa was bound, therefore, to keep out of the way of the Transporter, and her only mode of doing so was to have gone to starboard, and astern of her. To effectually excuse her for not doing so, she must show that at no time after she was first near enough to have discovered the Transporter could she have ported, and thus have avoided all chance of collision. As already remarked on this point, the proof is unsatisfactory, and her defence fails. The lookout on the Hansa failed to do his duty. He did not report the Transporter when he discovered her, on the ground, as he alleges, that he supposed the captain and pilot then saw her. This, of itself, was great negligence on his part. Nothing, under such circumstances, should be left to conjecture. He should have reported the steamer at once, and it is possible that his failure to do so may have prevented the Hansa from changing her course, as she otherwise would, or, at least, might have done.

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Platt, Receiver, &c., v. Beach.

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Let a decree be entered for the libellants, with an order of reference to compute the damages.

For libellant, *W. J. Haskett*.

For claimants, *W. Q. Morton*.

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## Eastern District of New York.

MARCH, 1868.

**FREDERICK A. PLATT, RECEIVER OF THE  
FARMERS' AND CITIZENS' NATIONAL BANK  
OF BROOKLYN, v. OREN M. BEACH.**

**BANKING ACT.—RECEIVER.—UNITED STATES OFFICER.—JURISDICTION.**

A receiver of a national bank, appointed under the thirty-first section of the National Banking Act (13 *Stats. at Large*, p. 99), is an officer of the United States.

This court, therefore, has jurisdiction of an action at common law, brought by such receiver (*Act of March 3d, 1815, sec. 4*), to collect a claim which was due to the bank at the time of his appointment.

This was a suit brought by the plaintiff to recover a sum of money, alleged by the plaintiff to have been due from the defendant to the bank, of which the plaintiff was appointed receiver by the Comptroller of the Treasury, with the concurrence of the Secretary of the Treasury, under the provisions of the thirty-first section of the National Banking Act (13 *Stats. at Large*, p. 99, sec. 31).

The defendant demurred to the complaint, assigning as the grounds of his demurrer—

*First.* That this court had no jurisdiction of the subject of the action.

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Platt, Receiver, &c., v. Beach.

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*Second.* That the plaintiff had not the legal capacity to sue.

*Third.* That the complaint did not state facts sufficient to constitute a cause of action.

*R. H. Huntley*, in support of the demurrer, argued as follows :

The first section of the National Banking Act establishes a separate bureau in the Treasury Department, which bureau is "charged with the execution of this and all other laws that may be passed by Congress, respecting the issue and regulation of a national currency secured by United States bonds."

The chief officer of this bureau is the Comptroller of the Currency, and he is under the general direction of the Secretary of the Treasury. He shall be appointed by the President, and shall have a competent deputy appointed by the Secretary. He shall, from time to time, employ the necessary clerks to discharge such duties as he shall direct, which clerks shall be appointed and classified by the Secretary of the Treasury, in the manner now provided by law.

Section thirty-one provides that, in a certain case, "the Comptroller may, with the concurrence of the Secretary of the Treasury, appoint a receiver to wind up the business of such association, as provided in this act."

Section fifty provides that, in certain other contingencies, the Comptroller may appoint a receiver, whose duties are clearly defined, and, among them, are these : "He shall collect all debts, dues, and claims belonging to such association, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts," &c.

Section fifty-six provides that "all suits and proceedings arising out of the provisions of this Act, in which the United States, or its officers or agents, shall be parties," shall be conducted by the district attorneys of the

several districts under the direction and supervision of the Solicitor of the Treasury."

It will readily be seen that none of these provisions authorize the plaintiff to bring this action, or this court to entertain it.

The inferior courts of the United States (Circuit and District Courts) have no jurisdiction, except such as Congress, by constitutional laws, has conferred upon them (*Hubbard v. Northern R. R. Co.*, 3 *Blatch.* 84; *ex parte Cabrera*, 1 *Wash. C. Ct.* 232; *Shute v. Davis*, 1 *Pet. C. Ct.* 431; *Livingston v. Jefferson*, 1 *Brock.* 203; *Turner v. Bank of North America*, 4 *Dall.* 8). But it is claimed that the Act of March 3d, 1815 (3 *Stat. at Large*, 245), section four, confers this jurisdiction. That section is as follows: "The District Court of the United States shall have cognizance, concurrent with the courts and magistrates of the several States and the Circuit Courts of the United States, of all suits at common law, when the United States, or any officer thereof, under the authority of any act of Congress, shall sue, although the debt, claim, or other matter in dispute, shall not amount to one hundred dollars."

Therefore, the defendant's counsel submits these two propositions:

*First.* The receiver is not an officer of the United States; and,

*Second.* Even if he were such officer, no act of Congress has authorized him to sue.

First.—This receiver is not an officer of the United States.

1. He fills no office. That is not an office which is not established by law or usage, but which is occasional or transitory, depending upon fluctuations and exigencies. An office must be fixed and established. The duties exercised by the incumbent may be occasional and transitory, but the office must be one always open, and ready for performance when such occasions arise—the

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incumbent may die or be removed, but the office remains, while, if the office is abolished, the officer ceases to exist.

A servant or agent may be appointed to do a particular thing, or perform a specific duty, and, as soon as the thing is done or the duty performed, his agency or service ceases. But he is no officer, and fills no office.

"An office is a public charge or employment, and the term seems to comprehend every charge or employment in which the public are interested" (Wood's Case, *Hopk. Ch. 6*; S. C. 2 *Coven*, 30, *note*). Thus a village tax collector is a public officer (*The People v. Bedell*, 2 *Hill*, 196). "Lexicographers generally define office to mean public employment; and I apprehend its legal meaning to be an employment on behalf of the Government in any station or public trust, *not merely transient, occasional, or accidental*" (In the matter of the oaths to be taken by attorneys and counsellors, 20 *Johns*. 493, per Platt, J.) "The phrase, 'civil officers,' in a constitutional provision prescribing the power of appointment of civil officers,—*Held*, to embrace those officers only, in whom part of the sovereignty, or municipal regulations, or general interests of society are vested, and not to include such functionaries as canal commissioners" (*United States v. Hatch*, *Burnett (Wis.)*, 22; cited in 2 *Abb. Nat. Dig.* 120, p. 48). 2. The position occupied by this receiver is simply that of trustee, not an office in which the public, as the public, are interested, but in which only particular individuals have any legal interest, viz: the stockholders and depositors of the bank. These are not the public. "Trustees are *private* or *public*. The former hold property for the benefit of an individual, or more than one, but who are distinctly pointed out, personally, or by other sufficient description. Public trustees are those who hold for the benefit of the whole public, or for a certain large part of the public, as a town or a parish, and they are usually treated as official persons, with official

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rights and responsibilities" (1 *Parsons on Contracts*, 2d ed. 101, 102, 104). This receiver is trustee for the depositors and stockholders, but not for the bill holders (*sec. 47 of the Act*; also *secs. 48, 49*). But neither the stockholders nor depositors, nor yet the bill holders, of a bank, are the public in a legal sense. They are persons who are distinctly pointed out personally, or by other sufficient description (*Parsons on Cont., supra*). 3. The same law that authorizes the appointment of this receiver, authorizes the election of a president of a bank, and all its other officers (*sec. 8*), but it cannot be pretended that the president of a national bank is a United States officer (*Christman v. Floyd*, 9 *Wend.* 342; *The New York and Harlem R. R. Co. v. The Mayor of New York*, 1 *Hilt.* 584, where it is held that the Metropolitan Police Commissioners are not State officers; and see *Id. p. 569*, O'Connor, *arguendo*). 4. The Constitution of the United States (*art. 1, sec. 9, paragraph 7*) provides that "no person holding any office of profit or trust under the United States, shall, without the consent of the Congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state." Under this clause it has been held that a marshal of the United States cannot, at the same time, hold the office of commercial agent of France (6 *Opinions of Attorney Generals*, 409). But can it be claimed that this receiver is under such interdiction? Again, article 2, section 1, provides that no person holding an office of trust or profit under the United States, shall be appointed an elector. Cannot this receiver be an elector? Again, article 2, section 2, paragraph 2, provides that the President "shall nominate, and by and with the consent of the Senate, shall appoint ambassadors," &c., \* \* "and other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law." The effect of this and the other clauses in the Constitution, on the subject of appointment to office, is

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to declare that all officers under the Federal Government, except in cases where the Constitution itself may otherwise provide, shall be established by law (*United States v. Maurice*, 2 *Brock*. 96). But there is no office of receiver of national banks established by law. Again, article 2, section 2, paragraph 2, provides, "but the Congress may, by law, vest the appointment of such inferior officers as they think proper, in the President alone, in the courts of law, or in the heads of departments." But this receiver was appointed by the Comptroller of the Currency, who is not the head of a department, but the "chief officer of a bureau" (*Bank Act*, sec. 1). The comptroller has no authority of appointment, even as to his own clerks. They are to be appointed and classified by the Secretary of the Treasury, in the manner now provided by law (*Ibid.* sec. 1). 5. By Act of Congress of June 11th, 1864 (13 *U. S. Stat. at Large*, 123), it is enacted, "that no member of the Senate," &c., \* \* \* "nor shall any head of a department, head of a bureau, clerk, or any other officer of the Government, receive or agree to receive, any compensation whatsoever, directly or indirectly, for any services rendered, or to be rendered, after the passage of this Act, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military or naval commission whatever." Now, can it for a moment be pretended that this receiver is such an officer as is here named or referred to; or that he cannot appear against the United States in any matter involved in the section quoted? This language cannot apply to him by any construction. Yet, if he is an officer of the Government, he is an officer of the United States, and, as such officer, he is under this interdiction (*Wise v. Withers*, 3 *Cranch*, 336). In this case, Marshall, C. J.,



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says : " A distinction has been attempted between an officer of the United States and an officer of the Government of the United States, confining the latter more especially to those officers who are considered as belonging to the high departments ; *but in this distinction there does not appear to the court to be a solid difference. They are terms which may be used indifferently to express the same idea.*" Again, no officer of the Government of the United States shall receive money for aiding to procure a contract of the Government (2 *Bright. Dig.* 105 ; *Act of July 16th, 1862, sec. 1*), nor act as a claim agent (1 *Bright. Dig.* 132, *sec. 3*). Does this language include this receiver ? Again, different classes of officers are spoken of in the various statutes and Acts of Congress, as " officers in a court of the United States " (1 *Bright. Dig.* 213, *secs. 63, 64, 65*) ; " an officer of the customs " (1 *Ibid.* 214, *sec. 66*). Persons employed by the collector of customs are " declared to be officers of the customs " (1 *Bright.* 322, *sec. 19*). Custom house employees are called clerks (*Id.* 323, *sec. 24*). Inspectors of customs, weighers, and guagers are not officers (*Id.* 319, *sec. 3*). The legislature makes a distinction between an officer and one discharging an official function under a department of the Government, and also between an officer and " a person holding a place of trust or profit " (*Act of February 26th, 1853, sec. 6* ; 10 *U. S. Stat. at Large*, 171). The attention of the court is particularly called to this entire section. Again, the Act of September 30th, 1850 (*sec. 1, 9 Stat.* 452), declares that in no case shall one individual be paid the salaries of two different offices on account of having performed the duties thereof at the same time. If, being the receiver of one bank constitutes the plaintiff an officer, then, if he is the receiver of another bank at the same time, he will be filling two offices at once, but one of which he can be paid for. Is this either the letter or the spirit of the Act authorizing his appointment ? The Act of Congress of April 27th, 1816 (3 *Stat.* 343), enacts that once

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in two years a register, containing correct lists of all the officers and agents, civil, military, and naval in the service of the United States, made up to the last day of September of each year in which a new Congress is to assemble, shall be compiled and printed under the direction of the Department of State. What Secretary of State would think of including this receiver in such a list? 6. If this receiver is an officer of the United States, he cannot hold an office under the government of some of the separate States, even though he resided in them. He cannot in Kentucky (*Rodman v. Harcourt*, 4 B. *Monroe*, 224; S. C. 499). 7. This receiver does not represent the Government. He only represents the creditors and stockholders of the bank (*Gillet v. Moody*, 3 N. Y. 488). He can no more be a United States officer than an assignee in bankruptcy under the Bankrupt Act can. 8. There is nothing in the nature of the institutions organized under the Currency Act, conferring jurisdiction on this court in this case. District Courts had no jurisdiction of actions by the United States Bank (*Bank of United States v. Martin*, 5 *Peters*, 479; *Bank of United States v. Deveaux*, 5 *Cranch*, 61). 9. The District Court had jurisdiction of an action brought by the assignee of a bankrupt under the Bankrupt Act of 1841, only because the sixth section of that Act specially conferred the jurisdiction (*Kelly v. Smith*, 1 *Blatchf.* 295-6). District Courts have such authority and jurisdiction as is conferred on them *expressly* by statute, and no other; and it was, therefore, held that a District judge could not remove an assignee in bankruptcy, or compel him to account (*Lucas v. Morris*, 1 *Paine*, 396). 10. The Judiciary Act of September 24th, 1789 (1 *Stat.* 78), contains this provision: "Nor shall any District or Circuit Court have cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover such contents if no assignment had been made, except in cases of foreign

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bills of exchange." Under this Act, it has been held that the general assignee of the effects of an insolvent cannot sue in the federal courts, if his assignor could not have sued in these courts (*Seré v. Pitat*, 6 *Cranch*, 332). The receiver is in no better condition to sue than the bank would have been (*Hyde v. Lynde*, 4 *Coms.* 392); clearly, then, he cannot bring this action. Speaking of jurisdiction of courts in certain cases, Ch. J. Marshall says: "The Act of 1815 contains a clause which does, we think, confer jurisdiction. It cannot be doubted that this clause vests jurisdiction expressly in the District Courts, in all suits at common law, where any officer of the United States sues under authority of any Act of Congress. The Postmaster General is an officer of the United States who sues under the authority of the Act of 1810, which makes it his duty to sue for debts and balances due to the office he superintends, and obliges him to sue in his own name" (*Postmaster General v. Early*, 12 *Wheaton*, 146). But where is there any Act which makes it the duty of this receiver to sue in his own name; and, if such authority be shown or implied, where is jurisdiction of this action expressly conferred on this court? "A receiver can only sue in the Circuit Court in case the corporation which he represents could have done so" (*Bradford v. Jenks*, 2 *McLean*, 130).

Second.—But even if it be conceded that this receiver is a United States officer, no statute has given him authority to sue in this court.

1. The Act of 1815 authorizes such officer to sue only where he is authorized by some act of Congress. As such officer could not be in the contemplation of the legislature until the passage of the National Currency Act, that Act must be looked to for his authority, and no other, unless it be subsequently enacted. Such authority must be express, and cannot be implied. It does not grow out of the fact that he has the common law powers of a receiver. Such powers enable him to go into

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a common law court, but not elsewhere. This principle is recognized in the Act itself. Section fifty provides that, upon the order of a court of record of competent jurisdiction, he may sell or compound all bad or doubtful debts. This clearly refers to a court already having jurisdiction, and confers no new jurisdiction. 2. This whole question is very simple. A receiver who, by the terms of the Act (*sec. 50*), is styled an agent, sues in a court which cannot entertain the action unless such receiver is an officer of the United States. That he is not such an officer has been clearly shown. It is for the plaintiff to discover, in the Act authorizing his appointment, authority for him to sue here—such authority cannot be shown either expressly, or by implication.

*B. F. Tracy* (*U. S. District Attorney*) and *R. D. Benedict*, for the plaintiff, argued as follows :

The question raised by the demurrer, is whether the plaintiff is an "officer of the United States?" If he is, this court has jurisdiction under the Act of March 3d, 1815 (*Bright. Dig. vol. 1, p. 231, sec. 13*).

*First.* Is plaintiff an officer? A receiver is always an officer (*Edwards on Rec. p. 3*, and cases cited; *Bouv. Law Dict.*, word "receiver;" *Parker v. Brown*, 8 *Paige*, 388; *Booth v. Clark*, 17 *How.* 331). What is he, if he is not an officer?

*Second.* Who have been held to be officers? 1. Inspectors of customs (*United States v. Barton*, *Gilpin*, 439; *United States v. Morse*, 3 *Story*, 87). 2. Special deputy collectors under the Act of March 2d, 1799 (1 *Stat. at Large*, p. 644; *Merriam v. Clinch*, *Blatchford, J.*, *U. S. Circutt Court*, *December*, 1867). 3. Bonded warehouse keepers under the Internal Revenue Act (*The United States v. Stern*, *U. S. Cir. Ct. South. Dist. of New York*). These keepers are appointed for every warehouse (*Act of 1866, sec. 40*). 4. Inspectors of distilleries are officers (*Ibid. secs. 29, 31*). 5. A sailmaker in the

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Washington Navy Yard (*Sanford v. Boyd*, 2 *Cranch C. C. R.* p. 78). 5. A clerk in one of the departments appointed by the comptroller (*Ex parte Smith*, *Ibid.* p. 693).

*Third.* Why is he not an officer? Chief Justice Marshall (*United States v. Maurice*, 2 *Brock.* 103) says: "An office is defined to be a public charge or employment, and he who performs the duties of the office is an officer. If employed on the part of the United States, he is an officer of the United States. Although an office is employment, it does not follow that every employment is an office. A man may be employed under a contract, express or implied, to do an act or perform a service, without becoming an officer. But if a duty be a continuing one, which is defined by rules prescribed by the Government, and not by contract, which an individual is appointed by Government to perform, who enters upon the duty appertaining to his station, without any contract defining them, if those duties continue, though the person be changed, it seems very difficult to distinguish such a charge or employment from an office, or the person who performs those duties from an officer." This receiver comes within every word of this definition. His duties continue. They are defined by statute, and not by contract. He is appointed by Government to perform them, and they would continue though the person of the receiver should be changed.

*Fourth.* If he is an officer, he is an officer of the United States (*Wise v. Withers*, 3 *Cranch*, 331).

*Fifth.* If the defendant criticises the mode of appointment, which he has no right to say any thing about, the appointment by a collector or a surveyor, with the approval of the head of a department, has been held to be an appointment by the head of a department (1 *Gall. C. C. Rep.* 215; 2 *Gall. C. C. Rep.* p. 15; *ex parte Smith*, 2 *Cranch C. C. Rep.* 693). The appointment of the plaintiff, by the comptroller, "with the concurrence of the Secretary of the Treasury," is exactly analogous.

*Sixth.* There are so many officers appointed in that way, that no court could, for a moment, think of holding that such a mode of appointment was unconstitutional.

*Mr. Huntley*, in reply, said: It is usual in speaking of an office without an incumbent, to say, the office is vacant, or, there is a vacancy in the office, implying that the station or franchise exists independently of any incumbent: and such is not only the common language or speech of men, but it is also the language of the courts, as in *Phillips v. Bury* (2 *Term Rep.* 351), where the court say, "Suspension does not create a vacancy in an office; it is only an impediment to the officer enjoying any benefit from it."

Also as in *Johnson v. Wilson* (2 *N. Hamp.* 202), where the court say, "An office, when once filled, cannot be considered vacant till the term of service expire, or till the death, removal, or resignation of the person appointed."

And again, as in *Wilcox v. Smith* (5 *Wend.* 231), where the court say, "To constitute an officer *de facto*, a mere claim to be a public officer, and exercising the duties of the office, are not sufficient; there must be some color of right to the office, or such acquiescence of the public as will authorize the presumption of at least a colorable appointment or election."

In *Plymouth v. Painter* (17 *Conn.* 585), the court say, "An officer *de facto* is one who exercises the duties of an office under color of right, by virtue of an appointment or election to that office; being distinguished on the one hand from a mere usurper of an office, and on the other from an officer *de jure*."

In the case of *Conner v. The City of New York* (2 *Sandf.* 355), *Sandford, J.*, at page 368, says, "An office is a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging (2 *Black. Com.* 36). And a public officer is every one

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*who is appointed to discharge a public duty, and receives a compensation for the same* (Per Best, Ch. J., in *Henly v. The Mayor of Lyme*, 5 Bing. 91)." \* \* "Public offices, in theory at least, are held and exercised for the benefit of the community," and at page 369, the same judge says, "Where *an office is created by statute*, it is wholly within the control of the legislature. The term, the mode of appointment, and the compensation may be altered at pleasure, and the latter may be even taken away, without abolishing the office."

At page 375, the same judge says, "In our opinion, a public officer is an agent, elected or appointed to perform certain political duties in the administration of the government."

"An 'office' which legislators are forbidden to create and then enjoy, *is any continuing charge, or employment, or duty*, defined by rules prescribed by law, and not by contract" (*Shelby v. Alcorn*, 36 Miss. 273).

The fact that the receiver was appointed by the Comptroller of the Currency, with the concurrence of the Secretary of the Treasury, does not strengthen the complaint, or change the plaintiff's condition. 1. The Act (sec. 50) confers the power of appointment on the Comptroller of the Currency, and not on the Secretary of the Treasury, and his concurrence or approbation is neither required nor directed. 2. If this were not so, the concurrence of the Secretary is not an appointment by him.

The first of these propositions has been passed upon by the courts, holding that an appointment by the head of a department, in a case where the constitution does not provide, must be authorized by law. In the case of *United States v. Maurice* (2 Brock. 96), the court holds, that appointments to office can be made by the heads of departments of the United States Government, in those cases only in which Congress has authorized it by law; and therefore, the appointment of an agent of fortifica-

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tions by the Secretary of War, there being no Act of Congress conferring that power upon that officer, is irregular.

BENEDICT, J. This is an action at common law, brought by a receiver of a national bank. A demurrer has been interposed to the complaint, for the purpose of raising the question of the right of the plaintiff to maintain such an action in a court of the United States. The claim to this right, on the part of the plaintiff, is based solely upon the fourth section of the Act of March 3d, 1815, it being conceded that there is no provision in the Act creating the national banks, which expressly gives to the national courts jurisdiction of such an action. The provision in the Act of 1815 relied on, confers upon the District and Circuit Courts of the United States, jurisdiction of "all suits at common law where the United States or any officer thereof, under the authority of any Act of Congress, shall sue;" and the question is, whether a receiver of a national bank appointed by the Comptroller of the Currency, with the concurrence of the Secretary of the Treasury, in accordance with the provision in section thirty-one of the Act of June 3d, 1864, vol. 13, chap. 10, which provides for the creation and winding up of the national banks, is an officer of the United States within the meaning of the fourth section of the Act of 1815 above referred to? As to the construction of this latter Act, it can hardly be doubted, I apprehend, that it includes all persons holding office under any Act of Congress, whose appointment is required, by law, to be made in the mode prescribed by the Constitution for the appointment of officers of the United States. The provision of the Constitution (art. 2, sec. 2, sub. 2,) is this:

"The President shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, Judges of



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the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law. But the Congress may, by law, vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments."

If, then, this receiver, who is appointed under an Act of Congress to perform certain official duties by virtue of the Act, is by law required to be appointed by the President, a court of law, or a head of a department, he must be deemed to have the right, under the Act of 1815, to resort to this court to bring such actions as he may be required to bring in the discharge of the duties imposed upon him by law. The mode of his appointment is prescribed in the same provision which provides for the appointment of such a receiver, as follows: "The Comptroller of the Currency, may, with the concurrence of the Secretary of the Treasury, appoint a receiver to wind up the business of such association, as provided by the Act" (*Sec. 13, 13 Stat. p. 709*). An appointment so made is equivalent in law to an appointment by the Secretary of the Treasury, who is the head of a department. This same question has arisen in regard to inspectors of the customs who are appointed under the Act of March 2d, 1799, which provides that the collector "shall, with the approbation of the principal officer of the treasury department, employ proper persons as weighers, gaugers, measurers and inspectors." Under this Act it was long ago decided that inspectors of the customs were, in law, officers appointed by the head of the treasury department (*United States v. Barton, Gilpin*, 439; *United States v. Morse*, 3 *Story*, 87; *Sandford v. Boyd*, 2 *Cranch. C. C. p.* 78; *ex parte Smith, Ibid.* p. 693). The words of the Banking Act are certainly as strong as those used in the Act of 1799, and must be held to have the like effect. It follows,

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then, that the plaintiff is an officer of the United States as defined by the Constitution, and accordingly within the meaning of the Act of March 3d, 1815. The nature of the duties imposed upon a receiver of a national bank also leads to the same conclusion. These duties are not defined by any contract, but by law and rule prescribed by the Government. They are similar to those appertaining to an ordinary receiver appointed by a court. But such receivers have always been considered to be officers (*Bouv. Law Dict.*, word "receiver;" *Edwards on Receivers*, p. 3), and they are officers of the court which appoints them. The plaintiff, then, is an officer, and as it is not seen how he can be considered to be an officer of any court, he must be an officer of the Government which appoints him, into whose treasury he is required to pay all moneys he shall collect, by whose district attorney he is required by law to be represented in court, and under the direction and supervision of whose Solicitor of the Treasury all his suits and proceedings are to be conducted (§ 56). The judgment must accordingly be in favor of the plaintiff upon the demurrer, with leave to the defendant to answer on payment of costs.

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MARCH, 1868.

## THE STEAMBOAT WASHINGTON IRVING.

LIEN.—FOREIGN VESSEL.—DELAY OF PAYMENT.—CREDIT OF OWNER.—  
PAYMENT BY DRAFT.

The fact, that a vessel which is repaired or supplied, is not in her home port, in the absence of other circumstances, makes a case of apparent necessity for the credit of the vessel.

This apparent necessity may be dispelled by proof of other circumstances, showing that the necessity for the credit did not exist, and did not appear to the material man to exist, at the time of his employment.

An agreement for delay of payment, in most cases, is additional evidence of the existence of an apparent necessity for the credit of the vessel.

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An agreement to do the work on the personal credit of an agent of the vessel, would be sufficient to defeat the claim of the material man against the vessel.

The existence of such an agreement is a fact which must be clearly proved.

Where the agent of a vessel, some months after repairs were done on her, and after part payment, gave a draft on a third party for the remainder, which was never paid or accepted, and was surrendered on the trial:

*Held*, That that did not amount to payment, nor did it go to show that the agreement for the work looked to the personal credit of the agent alone.

BENEDICT, J. This is an action to recover a bill of repairs furnished by the libellant, Young Tall, in Baltimore, to a vessel foreign to that port, for the amount of which a lien is claimed by the libellant to have been created under the maritime law; while the claimant insists that no such lien exists. Since the decisions of Mr. Justice Nelson, in the recent cases of the *James Guy* (5 *Blatch.* 496) and the *Neversink* (*Id.* 539), it must be considered that any doubts which may have arisen as to the law, applicable to the demands of material men against foreign vessels, no longer exist. Those decisions put a construction upon the opinion of the Supreme Court, in the case of *Pratt v. Reed*, which restores the law to its ancient, and, as was supposed, well-settled ground. Whether, then, a lien has been created in any particular instance depends upon the circumstances of the case, as they appear in evidence. If it appear that the vessel was in apparent need of the repairs for her employment or preservation, and if she was foreign to the port where the necessity was supplied, then, in the absence of contradictory circumstances, the maritime law presumes a necessity for the credit of the vessel, from the fact that she was at the time in a foreign port. The fact that the vessel was not in her home port, in the absence of other circumstances, makes a case of apparent necessity for the credit of the vessel. Thus Story, J., says, in the *Jerusalem* (2 *Gall.* 349): "It will be recollected that this is a foreign vessel, and that, by the general maritime law, every contract of the master for supplies and repairs imports a hypothecation." So, also,

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Curtis, J., in the case of the steamboat Eastern Railroad (1 *Curt. C. R.* 259), says, speaking of a vessel in a foreign port: "Under the maritime law, materials and supplies are presumed to be furnished on the credit of the vessel and owners until the contrary is proved." This apparent necessity, which springs from the fact that the vessel is in a foreign port, may, however, in all cases, be dispelled by proof of other circumstances, showing that the necessity for the credit did not exist, and did not appear to exist to the material man, at the time of his employment. Applying this rule of the maritime law to the present case, it is manifest that facts sufficient to create a lien are proved—if their effect be not overthrown by the other circumstances in proof—for the necessity of the repairs is shown, and it is conceded that the vessel when in Baltimore, was in a foreign port. The question of the case, then, is, whether the other facts averred in the answer, and proved by the evidence, are sufficient to warrant a conclusion upon the whole case, that it was apparent to the libellant, at the time of his employment, that there was no necessity for the credit of the vessel, or if such apparent necessity existed, credit was not given to the vessel. Turning then to the answer, it is found to aver, as matter of defence, that, by the agreement upon which the repairs were furnished, they were to be furnished upon the personal and individual credit of George Olney, and were to be furnished upon a credit of sixty days. As to the fact of an agreement for delay of payment, the proof is not very satisfactory, consisting, as it does, of the statement of Olney, which is contradicted by the libellant, and which, if taken as stated, hardly makes out any definite agreement for delay. But conceding that there was such an agreement, it does not tend to show the absence of an apparent necessity for the credit of the vessel, nor that such credit was not given, but the contrary, for Olney was a non-resident, and, as he himself says, in doubtful circumstances; the

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owner (Mott) was not present, nor, so far as was made known, had he funds in Baltimore to be applied to the payment of this bill, while Olney, also, was without money in hand, so applicable, as appears from his asking time, and his promises to pay as soon as he could get money from Washington. If it was the understanding that this vessel, which was in Baltimore temporarily, was to be surrendered by the libellant, and a delay of sixty days given for payment, it seems quite clear that the necessity for the credit of the vessel was not only apparent, but actual. An agreement for delay of payment, in most cases, is additional evidence of the existence of an apparent necessity for the credit of the vessel. "The truth is, that the maritime law presupposes a credit given, a delay of payment, an intentional postponement of the right to enforce the claim, *in rem*, at the same time that it creates the lien" (Story, J., 1 *Sum.* p. 84. See, also, the *Eliza Jane*, 1 *Sprague*, 153). But the answer further sets up the existence of an agreement between George Olney and the libellant, whereby the repairs in question were to be furnished upon the personal and individual credit of Olney, and not upon the credit of the vessel. Such an agreement, if proved, would be sufficient to defeat the claim of the libellant, and the existence of such an agreement is a fact which must be clearly proved (*The Fashion*, *Newbury*, 55). I see nothing in the attending circumstances which tends to prove the existence of such an agreement, and the decision of the point must rest, for the most part, upon the evidence given by Olney and the libellant. Upon this question the testimony of the libellant is most positive. He declares that he did the work upon the credit of the boat; that he would not have done the work upon the credit of Olney, and that he made no contract with Olney. The testimony of Olney upon this subject, when examined, appears by no means equally clear; in fact, he nowhere says definitely that the work was bargained for upon his personal credit,

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while Mr. Mott, the owner, testifies that he gave Olney instructions to draw on him for any repairs on the boat, and that he himself paid \$2,500 or \$3,000 on her account. It does not seem probable that Olney, under such circumstances, would have assumed upon himself the exclusive responsibility for the work, for it nowhere appears in evidence that, as between Olney and Mott, Olney was to bear the expense of the repairs. Mott was the owner then, and is the claimant now. He testifies: "I gave Olney instructions to draw on me for any repairs on her," and he does not pretend that the repairs were not for his account. The work was charged to the vessel, and to use the language of Mr. Justice Nelson, in the case of the bark *Prospect*, September, 1854, "There is nothing in the proofs to rebut or disprove the presumption of law, arising out of the transaction, that the credit was given to the vessel. The burden lay upon the respondent to show affirmatively that it was given—not to the ship, but to the owner." (See also the *City of New York*, Nelson, J., October, 1854.) As to the further fact averred in the answer, that the bill has been paid by draft, the evidence is, that some months after the work was completed, and after \$800 had been paid on account, Olney gave his draft on one Healy for the balance, which was never paid, nor, as appears, accepted, and which is now surrendered. This does not amount to payment, nor does it go to show that the agreement for the work looked to the personal credit of Olney alone. Indeed, the draft, mentioning as it does upon its face the vessel, may be considered some evidence that the credit of the steamer was then considered a part of the transaction. My conclusion, therefore, is, that the libellants are entitled to recover the sum of \$708.37, being the balance due upon the bill, with interest.

For libellants, *Emerson, Goodrich & Wheeler*.

For claimants, *Beebe, Dean & Donohue*.

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MARCH, 1868.

## THE STEAMBOAT WASHINGTON IRVING.

## LIEN FOR SUPPLIES.—DOMESTIC VESSEL.—PLEADING.

In an action against a vessel for supplies furnished to her in a foreign port, where the libel alleged that they were furnished on her credit, and the answer denied that they were furnished on the request of the owner, or the credit of the vessel, and averred that the owner was in good credit in the foreign port:

*Held*, That the admission that the vessel was in a foreign port, was an admission of an apparent necessity for the credit of the vessel.

That, on the pleadings, the only question was, whether the supplies were furnished.

This is an action for supplies furnished by Bentley C. Bibb, the libellant, to the steamboat Washington Irving. The libel alleged that the supplies were necessary for the vessel; that they were furnished at the request of the owner in Baltimore, to which port the vessel was foreign, and that they were furnished upon the credit of the vessel.

The answer admitted that the vessel was a foreign vessel, and denied that the supplies were furnished upon the request of the owner, or upon the credit of the vessel; it also averred that the owner was a person in good credit in Baltimore.

*Emerson, Goodrich & Wheeler*, for the libellant.

*Beebe, Dean & Donohue*, for the claimant.

BENEDICT, J.—The pleadings in this case called upon the libellant to prove no more than the fact that the supplies were furnished, for the existence of an apparent necessity for the credit of the vessel is admitted, by the admission of the fact that the vessel was in a foreign

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The Steamboat Washington Irving.

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port. Where there is such an apparent necessity, the maritime law presumes that the credit of the vessel was relied on. The necessity of the repairs being proved, as has been done, the libellant is accordingly entitled to a decree, unless the facts set up in answer and proved are sufficient to repel the presumption of the maritime law. The answer in this case, when examined, is found to aver no such facts. Its only averments in defence are, that the owner of the vessel was well known and in good credit in the place where the supplies were furnished, and that the libellant had been for many months selling upon credit supplies to the vessel. There is no averment that the owner was present when the supplies were contracted for, or that his responsibility was known to the libellant, and relied on to the exclusion of the credit of the vessel, or that the supplies were furnished upon the personal credit of the owner, or of any other person. This case might, therefore, be disposed of upon the ground that, under the pleadings, the only question in dispute was the fact that supplies were furnished. But the facts proved outside of the pleadings do not amount to a defence. They are, for the most part, similar to the facts proved in the case of *Young Tall* against this same vessel (*Ante*, p. 318), and are not sufficient to warrant a finding that the transaction was other than the ordinary case of supplying the necessities of a foreign vessel.

The decree must accordingly be for the libellant for the amount of the bill, with interest.\*

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\* See the case of *The Grapeshot*, decided by the U. S. Supreme Court, on March 14, 1870.



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In the Matter of Chauncey W. Moore, a Bankrupt.

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MARCH, 1868.

**IN THE MATTER OF CHAUNCEY W. MOORE, A  
BANKRUPT.****SPECIFICATIONS OF OBJECTIONS TO DISCHARGE.**

Where specifications of objection to a bankrupt's discharge had been filed, and the creditors then moved for leave to take testimony, which motion was opposed, on the ground that the ground of objection alleged was an assignment made by the firm, of which the bankrupt was then a member, before the passage of the Bankruptcy Act, and consequently not within the meaning of the twenty-ninth section of the Act:

*Held*, That the specifications not only alleged such assignment, and that it was fraudulent, but also alleged that the property had remained in the possession of some of the assignors ever since the assignment, and that this was done with the knowledge and assent of the bankrupt.

That the court would not, on such a motion, pass upon the question whether such a state of facts, if proved, would amount to a fraud under the twenty-ninth section of the Act.

That leave to take evidence would be granted.

This was a voluntary proceeding in bankruptcy instituted by Chauncey W. Moore, who was a member of the firm of C. W. & J. T. Moore & Co.

Certain creditors, opposing the discharge of this bankrupt, filed specifications of the grounds of their opposition, and thereupon, on notice to the bankrupt, moved for a trial and for leave to take testimony.

The motion was opposed, on the part of the bankrupt, upon the ground that the grounds of opposition set forth in the specifications consisted of an alleged fraudulent assignment, by the firm of C. W. & J. T. Moore & Co., in 1861, long before the passage of the Bankruptcy Act, and, consequently, not within the meaning of the twenty-ninth section, which, it was contended, was limited to transactions since the passage of the Act.

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In the Matter of Chauncey W. Moore, a Bankrupt.

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BENEDICT, J. It is unnecessary now to express any opinion upon the bare proposition, whether the words, "fraudulent payment, gift, transfer, conveyance, or assignment of any part of his property," in the twenty-ninth section, are to be construed as if limited by the words, "contrary to the provisions of this Act," or "since the passage of this Act," elsewhere used in the section, inasmuch as the specifications in this case appear to me to raise a somewhat different question.

These specifications not only aver a fraudulent assignment, made in 1861, with the intent to enable the assignors to retain the control and disposition of a large amount of property pretended to be assigned, but they go further, and aver that this property has ever since been in the charge and custody, or under the control of the assignors, or some of them; that no dividend or other distribution of this property has ever been made to the creditors under the assignment; that one of the members of the firm now has in his hands, or under his control, a large amount of property and assets, pretended to have been included in that assignment, and that this disposition, detention, and custody of the property is with the knowledge, consent, and connivance of the petitioner now before the court.

Whether such a state of facts, if proved, would not amount to a fraud within the meaning of the twenty-ninth section, which should defeat a discharge, is a question which I am not inclined to pass on finally by denying a motion like the present.

Leave will accordingly be given to take proofs in support of these averments.

The present motion also includes an application to amend the sixth specification, which, it is conceded, is not sufficiently specific. The permission will be given, as the opposition, in this case, is manifestly made in good faith, and the rules governing the specifications could not be considered as settled.

The motion is accordingly granted.

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Latson v. Sturm.

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MARCH, 1868.

NORMAN L. LATSON *vs.* HERMAN STURM.CHARTER PARTY.—REPRESENTATIONS AS TO VESSEL.—OVERLOADING.  
—DEVIATION.

Where a steamer was chartered in New York for a voyage to Tampico and back, the charterer to appoint all the officers except the master and chief engineer, and the vessel went to Tampico, and was there sent by the charterer up the Panuco river, where she received injury, and on her return the owner filed a libel against the charterer to recover a balance of charter money, and also damages for the injury received by her, and the charterer set up, as a defence, that the vessel was chartered on representations made by the owner which were untrue: *Held*, That on the facts the vessel was not chartered on representations, but on a full examination of her by the charterer.

That the vessel was overloaded by the charterer.

That the charterer was liable for the amount remaining due of the charter money, and also for injury received by her in going up the Panuco river, whither she was sent contrary to the charter.

This action was brought upon a charter party of the steamer General McCallum, for a voyage from the port of New York to Tampico and back. According to the charter, the charterer was to bear all the expenses of the vessel, including insurance, and appoint all the officers and crew, except the master and chief engineer, and pay \$100 per day for the use of the vessel upon the voyage in question. The vessel was accepted by the charterer, loaded and dispatched upon the voyage, and in time returned, having, during the voyage, been sent by the charterer up the Panuco river, which was no part of the voyage contracted for in the charter party, and where she received some injury by touching the ground.

The defence was that the vessel was not in the condition represented by her owner—that she could not make the speed which it was alleged she would—that

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*Latson v. Sturm.*

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she was unsound and unfit for the voyage in question, and, therefore, the charterer could procure little return cargo, and that at reduced freight, whereby the charterer sustained great damage; and, further, that the charterer had, in the charter, reserved an option to purchase the vessel at a fixed price, with the intention of selling her in Mexico; that this object was known to the ship-owner, and the possibility of such a sale formed a principal inducement to the charter; that, by reason of the false representations of the ship-owner, as to the capacity of the vessel, and also by reason of her unsound and unfit condition, no sale of her could be effected by the charterer, and his option proved valueless, whereby the adventure resulted in the loss of a large sum, which the respondent claimed to recoup against any sum unpaid upon the charter party.

For libellant, *Benedict & Benedict.*

For respondent, *Beebe, Donohue & Cook.*

BENEDICT, J. Upon the proofs, as they stand, this case is, beyond any doubt, a clear one for the libellant. On the evidence, before me, the injury to the engine, and consequent delay of the vessel in executing the voyage, arose from the action of the respondent in overloading her—and it does not appear that any misrepresentations were made as to her condition or capacity. She was chartered only after an examination of her by the charterer and his agents, and upon that examination instead of upon representations. The balance of the charter money is, therefore, clearly due, and it is equally clear that the respondent is liable for any injury sustained by the vessel in going up the Panuco river, where the charterer had no right to take her, under the contract.

That she went up the river, is admitted, and that she there received some injury, is proved.

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The Steamship William Taber.

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The loss occasioned by this deviation from the voyage contracted for must be borne by the charterer, and not by the shipowner.

The libellant is also entitled to recover any sum paid by him upon drafts drawn by the master for stores, &c., at Galveston, Key West—all which expenses are, according to the charter, to be borne by the charterer.

Let a decree accordingly be entered in favor of libellant, with an order of reference to ascertain the amount.

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## Southern District of New York.

APRIL, 1868.

### THE STEAMSHIP WILLIAM TABER.

BILL OF LADING.—NONDELIVERY.—BARRATRY.—DAMAGES.—PRESUMPTION OF LAW.—SALVAGE.

Where cotton was shipped at Galveston, on a vessel bound to New York, and bills of lading were given therefor, and, on the voyage, the vessel was barratrously run ashore, and part of the cotton was lost, and a part of it, which had been saved in a damaged condition, was libelled for salvage, and the owners of the cotton paid the amount of salvage decreed, and libelled the vessel on the bills of lading:

*Held*, That the vessel was liable to the owners of the cotton for the value of the cotton lost, and for the injury to that which was saved, and for the money paid by them as salvage.

In case of loss or damage to goods covered by a bill of lading, the presumption of law is, that such loss or damage was occasioned by the act or default of the carrier.

BLATCHFORD, J.—This is a libel filed by six several parties, owners of cotton in bales, shipped by the steamship William Taber, from Galveston, Texas, *via* Key West, in Florida, to New York, in March, 1867. The

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The Steamship William Taber.

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cotton was shipped under bills of lading, signed by the master of the vessel, and given to the agents of the several owners of the cotton. The claim made by the libel covers two grounds of action: 1. A claim for the nondelivery of cotton covered by the bills of lading, and for damage to cotton covered by the bills of lading, that was delivered; 2. A claim that the vessel should refund to the libellants a sum of money, which they were compelled to pay, as salvage on the cotton covered by the bills of lading, by the decree of the District Court of the United States for the Southern District of Florida, sitting in admiralty, at Key West, in Florida, on the ground that the salvage was made necessary by the willful and tortious act of the master of the vessel, or some other person in charge of her, in running her ashore near Key West.

The nondelivery of some of the cotton, and the damage to some that was delivered, are clearly proved, and the claimants have entirely failed to show that the loss or damage was by a peril of the sea, or by any cause for which the vessel is not liable. On the contrary, the evidence is entirely satisfactory to show that the loss and damage were caused by the willful act of the master or the engineer of the vessel, in letting water into her just after she had left Key West, on her way to New York, as a consequence of which she was run ashore. The running of her ashore made the salvage necessary, and, as against the salvors, the owners of the cotton were defenceless in the salvage court, and were obliged to pay the salvage money. The payment of this money being caused directly by the barratrous act of some person in charge of the vessel, the vessel is liable to refund it to those who paid it. The carrier created this lien on the cotton, while lawfully charged with its custody. The lien was a valid one, as between the owners of the cotton and the salvors, although the act by which it was created was a tortious act on the part of the carrier, as

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The Steamship William Taber.

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between such owners and the carrier. Indeed, the liability of the vessel to refund the salvage money on the cotton may be properly considered as a liability arising on the bills of lading, as the transaction amounts, in effect, to a loss of so much of the cotton by what is, in fact, held to be the default of the vessel. For, if the libellants had not paid the salvage money on the cotton in accordance with the decree of the court, enough of the cotton to pay the salvage would have been sold. This view brings the entire case within the well settled principle, that, in case of loss or damage to goods covered by a bill of lading, the presumption of the law is, that such loss or damage was occasioned by the act or default of the carrier, and the burden of proof is upon the carrier to show that it arose from a cause for which he is not responsible. The answer neither admits nor denies the averments of the libel as to the barratrous acts of the master, but states that the claimant leaves the same to be proved, and that there is no liability on the part of the vessel to the libellants for such acts, and that the reason why there is not is, that such acts are alleged to have been willful, fraudulent, and barratrous. But the law is well established, that where the owner of a vessel is under an obligation imposed upon him by virtue of his office as carrier, he is liable for the willful tort of his servant, if it was committed while in his employ, and in the management of the vessel or conveyance under his control; and this even though the wrong was done in direct opposition to the express commands of the owner (1 *Parsons' Maritime Law*, book 1, ch. 11, p. 394). There must be a decree for the libellants, with costs, and a reference to a commissioner to ascertain the damages caused by the loss or damage to the cotton, and by the payment of the salvage money on the cotton.

*J. H. Choate*, for the libellants.

*C. A. Peabody* and *W. H. Peckham*, for the claimant.

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In the Matter of George S. Mawson, a Bankrupt.

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APRIL, 1868.

IN THE MATTER OF GEORGE S. MAWSON, A  
BANKRUPT.

VAGUE SPECIFICATIONS OF OPPOSITION TO DISCHARGE.

Specifications of opposition to a bankrupt's discharge were filed, which stated that he had concealed part of his estate, and had not delivered all his property to the assignee, and had made a transfer of part of his property to prevent its coming into the hands of the assignee:

*Held*, That they were too vague, and should have specified the property.

A specification stated that the bankrupt had procured the assent of certain named creditors to his discharge, but did not state that such assent was procured by a pecuniary consideration or obligation:

*Held*, That it was insufficient.

The same specification stated that the bankrupt had influenced the action of "the said creditors," since the filing of his petition, by a pecuniary consideration and obligation:

*Held*, That it was sufficient.

In this case, a creditor filed specifications of objection to the bankrupt's discharge as follows:

*First*. That the bankrupt has concealed part of his estate, and has been guilty of fraud in not delivering to the assignee all of the property belonging to him at the time of the presentation of his petition and inventory.

*Second*. That the bankrupt has procured the assent of Arnold, Nusbaum and Nordlinger, creditors, to his discharge; and that he has influenced the action of the said creditors, since the filing of his petition, by a pecuniary consideration and obligation.

*Third*. That, in contemplation of becoming bankrupt, he has made a transfer or conveyance of part of his property, for the purpose of preventing the same from coming into the hands of the assignee, and of being distributed according to law in satisfaction of his debts.



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In the Matter of George S. Mawson, a Bankrupt.

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*F. C. Nye*, for the bankrupt.

*J. Solis Ritterband*, for the creditor.

BLATCHFORD, J. The first and third specifications of the grounds of opposition to the discharge are altogether too vague and general. The first ought to specify, with some particularity at least, what part of his estate he has concealed, and what property he has fraudulently failed to deliver. The third specification should state what part of his property he has so transferred.

As to the second specification, a bankrupt is not forbidden, by the twenty-ninth section of the Act, to procure the assent of a creditor to his discharge, nor is he forbidden to influence the action of a creditor. The prohibition is against procuring such assent by any pecuniary consideration or obligation, and against influencing such action by any pecuniary consideration or obligation. The second specification in this case only avers, in regard to procuring the assent of the creditors to the discharge, that the bankrupt procured such assent, and does not aver that he procured it by any pecuniary consideration or obligation. It is, therefore, insufficient in that respect. In regard to influencing the action of the creditors, the specification names the creditors, and states that the influencing took place after the filing of the petition, and was by a pecuniary consideration and obligation. It does not state what the influencing consisted in, but it may, perhaps, fairly be inferred, that the specification means that it consisted in procuring the assent of the creditors named to the discharge. No other influencing can be given in evidence under the specification. The time is, perhaps, sufficiently averred, and, although the amount of the pecuniary consideration or obligation is not stated, I am inclined, on the whole, though with considerable hesitation, to hold the specification sufficient in its averment in regard to influencing the action of the

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Holyoke v. Depew.

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creditors named, in the respect above defined. It borders very much, however, on a fishing specification, as, if the party had any facts within his knowledge or information, it is to be supposed he would have specified them.

The case will stand for hearing on so much of the second specification as is so held to be sufficient, and will be heard whenever the parties have taken all the testimony they desire to present on the point. A reference may be had to the register in charge to take testimony on either side.

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APRIL, 1868.

GEORGE E. HOLYOKE AND JAMES MURRAY *vs.*  
WILLIAM DEPEW.

CHARTER PARTY.—RESTRAINT OF GOVERNMENT.—DEAD FREIGHT.—  
RECOUPMENT.

Where a vessel was chartered for a voyage to the Canary Islands and back to New York, the charter providing that the charterer should furnish, at the Canary Islands, 150 tons of barilla and 20 pipes of wine, or more, and the vessel arrived at the Canary Islands and discharged her outward cargo, on which freight was paid, and received on board 20 pipes of wine, but no barilla, although the charterer had it ready for her, because the authorities would not allow it to be put on board of her, unless she would first go to Vigo, in Spain, to quarantine, and the master refused to go to Vigo, but, after waiting the number of lay days specified, returned to New York, being obliged, for lack of the barilla, to put in at St. Thomas for ballast, and, on her arrival at New York, her owners sued the charterer to recover freight on the wine delivered, and dead freight for the 150 tons of barilla, and damages for being compelled to put in at St. Thomas:

*Held*, That, as there was in the charter no exception of restraints of princes, there was an absolute engagement on the vessel's part to receive on board the barilla, even though the authorities of the Canary Islands should prohibit its being put on board.

That, in the absence of such a clause in the charter, the vessel was in fault in not being in a condition to receive the barilla, and the vessel, and not the charterer, must bear the loss.

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Holyoke v. Depew.

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That the acceptance of the outward cargo, and the loading of the wine, did not excuse the failure of the vessel to put herself in a condition to receive the barilla.

That the libellant was entitled to freight on the wine brought, but the charterer was entitled to recoup against it any damages set up in the answer, which arose out of any breach of the charter party by the libellants, to the amount of such freight, but, for any claim beyond that, he must resort to his own proper action.

This was a libel for the breach of a charter party, brought by the owners of the schooner *Ocean Belle* against her charterer. The charter was made at New York, on the 18th of May, 1866, by Holyoke & Murray to William Depew, and chartered the vessel for a voyage from Bath, Maine, to Charleston, South Carolina, "thence to Palmas, Grand Canary, and discharge outward cargo, and load part there, and the rest at one or two ports at Fuerteventura or Lanzarote, or one port in each of them, and back to New York." The charter provided that the vessel should receive on board, during the voyage, the merchandise thereafter mentioned, and that the charterer should furnish to the vessel outward from Charleston a cargo of yellow pine lumber, and in the Canary Islands 150 tons of barilla and 20 pipes of wine, or more, at the option of the charter friends, and should pay to the owners "for the use of said vessel during the voyage aforesaid," a specified sum for each one thousand feet of lumber delivered at the Canary Islands, payable on proper delivery, "and homeward on barilla six dollars per ton, and five dollars per pipe for wine, payable on proper delivery of cargo, in gold or its equivalent;" "the cargo or cargoes to be received and delivered alongside within reach of the vessel's tackles," "charterers paying vessel's port charges in Canary Islands."

The vessel took on board the lumber, and delivered it at Palmas. At Palmas she took on board 20 pipes of wine, but no barilla or any other cargo. The wine was delivered to the charterer at New York, but the freight

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was not paid. The libel averred, that the reason why the vessel brought home no barilla was, that none was furnished to her, and that, in consequence of the want of a full cargo, she had not the necessary ballast, and was obliged to go before the wind to St. Thomas, and take in ballast; and that such deviation caused a delay of forty days, and a damage of \$1,000. The libel claimed \$100 in gold, freight on the 20 pipes of wine, at \$5 per pipe, \$900 in gold, as compensation in lieu of freight on 150 tons of barilla, at \$6 per ton, and \$1,000 for the damage by the deviation to St. Thomas.

The defence set up in the answer was, that the respondent was ready to put the barilla on board, but the vessel refused to take it, the refusal consisting in the fact that the vessel had not such a clean bill of health as the authorities at the Canary Islands required, and was therefore prohibited by the authorities from taking on board the barilla; that the respondent was not liable for any damage caused by the deviation to St. Thomas; that, through negligence on the part of the vessel, some of the lumber carried outward was lost, and the arrival of the rest was delayed; that the respondent was entitled to recover from the libellants \$2,500 as damages for loss of profits on the barilla, and for loss of market for and profits on lumber, caused by the delay in its arrival, and for loss of lumber, and otherwise; and that the respondent was not liable for any sum to the libellants.

The facts of the case were agreed on by the respective parties, as follows: The schooner was furnished by the Spanish consul at Charleston with a clean bill of health, and started for Palmas with her cargo of lumber. On the voyage, she was obliged, by stress of weather, to put into Newport, Rhode Island, for repairs. From the same cause she lost a part of her deck load of lumber. She remained at Newport for about thirty days. While she was there, and when she left there, the Asiatic

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Holyoke v. Depew.

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cholera prevailed at New York, and at some other places in the United States, but not at Newport or Charleston, nor did it prevail at Charleston when she left there. She went from Newport to Palmas with so much of her outward cargo as had not been lost. The port of Palmas has no harbor, nor has the port of Cabras, hereafter mentioned, in the island of Fuerteventura, but vessels proceeding to those ports come to anchor in a sort of roadstead on the windward side of the island, as near to the shore as possible, and are then loaded by means of lighters, which bring the cargo to them from the shore. The schooner, on her arrival at Palmas, came to anchor at the usual place of anchorage of vessels, and reported to the respondent's agent there, one Wood, who was the consignee of the cargo. Pursuant to the health laws and regulations duly established by the civil authorities of the Canary Islands, such authorities refused to permit the schooner to discharge her cargo, or receive any homeward cargo at Palmas, or hold any communication with the shore, because, as she had last sailed from Newport, a port of a country reported to be infected with Asiatic cholera, such laws and regulations required her to proceed forthwith to the port of Vigo, in Spain, a Spanish quarantine station, and there pass examination, and return to the island, after which, and not till then, she would be permitted to receive her homeward cargo. The master of the schooner refused to go to Vigo, which was distant fifteen or twenty days' sail from the Canary Islands. When the charter party was made, neither of the parties to it knew any thing of the existence of such laws and regulations of quarantine at the Canary Islands. No quarantine station existed at those islands at the time the charter party was made, or at any subsequent time up to the time the schooner finally left there. After some negotiation, the authorities of the island permitted the schooner to unload her outward cargo, and receive on board twenty pipes of wine

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as part of her homeward cargo. After that, at the request of Wood, she remained at her anchorage at Palmas some six days, to enable Wood to hear from certain correspondents of his, respecting the barilla for the homeward cargo. Wood then directed the schooner to go to the island of Fuerteventura, where the barilla required for her homeward cargo then was, ready to be laden on board the schooner, and take the same on board, and then proceed direct to New York. She accordingly proceeded to Cabras, the port of Fuerteventura. On arriving there, she made the usual anchorage, and her master communicated with one Hogg, the respondent's agent there. Under the same health laws and regulations, the authorities of the island of Fuerteventura refused to permit the schooner to receive any barilla, or hold any communication with the shore, and for the same reason as at Palmas, unless she would proceed to Vigo, and there pass an examination, and return to Cabras, after which, and not until then, she would be permitted to receive on board the barilla. Both of the islands are subject to the Spanish Government. After some fruitless negotiations between Hogg and the authorities, Hogg told the master, that, if he would return to Palmas, he, Hogg, would send over the barilla immediately in lighters. Hogg believed at the time that he would be able to do so, but he subsequently found himself unable to do so, because the authorities, pursuant to such health laws and regulations, interfered and prohibited him from doing so. The schooner thereupon returned to Palmas. At that place, Wood informed the master that the vessel must go forthwith to Vigo, and there quarantine, as required by the authorities, and that, unless she did so, she would not be permitted to receive her homeward cargo. The master refused to go to Vigo with the vessel, and therefore the vessel received no barilla. The master then stipulated that the vessel would go to Vigo, and there go into quarantine, if the

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charterer would pay the additional expenses to be thus incurred. This stipulation was rejected by Wood. The master then stipulated that he would proceed to St. Thomas, and there fill out the homeward cargo, if Wood, as agent of the charterer, would take upon himself the risk of the loss or gain on such voyage, and the risk of the loss of the vessel by reason of such a deviation from her voyage. This proposal was rejected by Wood, on the ground that he had no authority to accept it. Thereupon the vessel, her lay days named in the charter party having expired, sailed from the Canary Islands for home, without the knowledge or consent of the respondent or his agent. For want of a full cargo, she was short of necessary ballast, and she was obliged to deviate from her direct homeward voyage, to obtain ballast, by which deviation she lost some thirty days, besides being subjected to some additional expense. Freight was paid at Palmas for so much of the outward cargo as was delivered there.

For libellants, *E. D. McCarthy.*

For respondent, *A. R. Dyett.*

BLATCHFORD, J.—The principal question contested in this case is, whether the respondent is liable for dead freight, or damages in lieu of freight, on the barilla called for in the charter party. It is contended, on the part of the libellants, that the health regulations of the Islands did not suspend, impair, or dissolve the contract; that the vessel was in no fault; that the charterer was in fault in not supplying the barilla; and that the prohibition of the authorities fell on the charterer and not on the vessel. On the part of the respondent it is contended, that it was, by the contract, a condition precedent to the charterer's duty to furnish the barilla, that the vessel should be ready and able to take it on board;

that the barilla was ready, and the charterer did every thing which it was in his power to do without the concurrence of the vessel; that it was the vessel that was prevented from taking the cargo on board, and not the charterer who was prevented from putting it on board; that the vessel was never in a condition to receive the barilla, and did not perform her part of the charter party, and, therefore, the condition precedent to the liability of the charterer for any omission to put the barilla on board never arose; and that there was no fault on the part of the charterer.

The question involved is one depending entirely on the construction of the contract between the parties. By the contract, the vessel agrees to receive on board the barilla, and the respondent agrees to provide and furnish the barilla to the vessel, in the Canary Islands, the cargo to be received alongside within reach of the vessel's tackles. The only exception or reservation made by the contract in respect to these absolute engagements, is contained in the following clause: "the dangers of the seas and navigation, of every nature and kind, always mutually excepted." There is no exception in regard to the restraints of rulers and princes, an exception often inserted in charter parties, and applying solely to the vessel, unless expressly stipulated to be mutual (*Blight v. Page*, 3 *B. & P.*, 295, *note*; *Tonteng v. Hubbard*, 3 *B. & P.*, 298; *Sjoerds v. Luscombe*, 16 *East*, 201, 206; *Bruce v. Nicolopulo*, 24 *L. J.*, *new series*, *part 2*, *Ex.*, 321; *Duff v. Lawrence*, 3 *Johns. Cases*, 167). Therefore, in the present case, there was an absolute engagement on the part of the vessel to receive on board the barilla, even though the authorities of the Canary Islands should prohibit its being put on board. Such prohibition did not dissolve the contract, nor can it absolutely excuse a nonperformance of it. Where a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident



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by inevitable necessity, because he might have provided against it by his contract (*Blight v. Page*, *above cited*; *Hadley v. Clarke*, 8 *T. R.*, 259, 267; *Spence v. Chodwick*, 10 *Q. B.*, 530; *Medeiros v. Hill*, 8 *Bing.*, 231). The libellants might have inserted in the charter party a provision exempting them from being obliged to perform its covenants if restrained by rulers or princes. But there is no such provision. There was, however, a restraint by the authorities of the Canary Islands against shipping the barilla, and the question is, whether such restraint shall fall on the vessel or on the charterer. The charter party not having provided that the restraint should not, in any event, fall on the vessel, the only proper question for determination in this suit is, whether there was any such default on the part of the charterer as makes him responsible for the failure to load the barilla. The restraint was not one against the exportation of barilla generally, as in *Blight v. Page* (*above cited*), where the charterer was held liable. In that case, the charter party contained an exception in regard to the restraints of rulers and princes, and the exportation of barley generally, which was to be the homeward cargo, was prohibited by the authorities of the place of exportation. So, also, in *Sjoerds v. Luscombe* (*above cited*), where the charterer was held liable, the charter party contained an exception in regard to the restraints of rulers and princes, which the court held operated as an excuse only for the shipowner, and the loading of the homeward cargo contracted for was prevented by an embargo on all shipping. In *Barker v. Hodgson* (3 *M. & S.*, 267), where the charterer was held liable, a pestilence broke out at Gibraltar, where the homeward cargo was to be laden on board, and, for that reason, the lading of the cargo was prohibited by law, and the decision of the court was placed on the ground that thereby the charterer was prevented from furnishing the cargo. In the present case, there was no general prohibition of the exporta-

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tion of barilla, no embargo on all shipping, no pestilence at the place of loading, and nothing which prevented the charterer from furnishing barilla to a proper vessel. It is agreed that the cargo of barilla was at the Island of Fuerteventura, ready to be laden, but the authorities refused to permit this particular vessel to receive it, because she had not properly quarantined at Vigo. In the absence of any clause exempting the vessel from liability because of the restraints of rulers and princes, I think the fault was hers in not being in a condition to receive the barilla, and that her owners and not the charterer must bear the loss (*Ogden v. Graham*, 31 *L. J.*, *new series*, *part 2*, p. 29; *Spence v. Chodwick*, 10 *Q. B.*, 528; *Brooks v. Minturn*, 1 *Cal.*, 484). The case is unlike that of *Morgan v. The Insurance Company of North America* (4 *Dallas*, 455). There it was held that the vessel had been in no fault. She took goods at Philadelphia on freight for Surinam, when there was an open commerce between the two ports. When she arrived at Surinam, the authorities would not permit the cargo to be landed. The prohibition did not rest upon any thing in the character or status of the vessel. The court held that the obtaining permission to land the cargo was the business of the consignee, and that the freight was earned although the cargo was not delivered. The prohibition was like the embargo in *Sjoerds v. Luscombe*. But, in the present case, the difficulty was with the vessel. She was never in a condition to receive the cargo, because she had failed to comply with the health laws and regulations of the Islands. Upon the agreed facts, I can perceive no well founded legal difference between the present attitude of the vessel, and her attitude if she had refused to submit to a lawful quarantine at Palmas, and had, therefore, left without the homeward cargo which she contracted to carry. The true rule is, I think, laid down in *Duff v. Lawrence*, (3 *Johns. Cases*, 164, 165). It is that where the owner of

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a vessel agrees to carry and deliver goods, unless prevented by some of the impediments mentioned in the charter party, many occurrences may take place, and loss or injury arise, in consequence thereof, which were not in contemplation of the parties at the time the charter party was entered into, and, of course, not provided for, and which must be borne by them respectively as it shall happen to fall; and that damage sustained in consequence of the vessel being obliged to perform quarantine, ought to be borne by the owner of the vessel, for it is a temporary prohibition, in no manner provided for in the contract, and which the shipowner ought to submit to, without prejudice to the charterer.

It is claimed by the libellants, that, even though the vessel was under an obligation to go to Vigo, the conduct of the charterer's agents at the Islands amounted to a waiver of the performance of that obligation. It is alleged that it was the duty of the agent of the charterer, when the vessel arrived at Palmas, to have refused to accept the cargo she carried, or to attempt to supply her with any return cargo, until she had gone to Vigo and quarantined, if the plea now set up in defence was to be made. But I cannot concur in this view. The vessel was bound by the contract to go to both Palmas and Cabras, and her return from the latter port to the former was the result of a mutual arrangement between the master and Hogg, made in good faith on both sides, aside from the charter party. The master was under no obligation to return to Palmas. He might properly have refused to do so, and have gone directly from Cabras to Vigo. The agreed facts show that the charterer's agent always insisted, up to the very last, that the vessel should go to Vigo, and never waived the performance, by the vessel, of her obligation to go there. Nor can the acceptance of the lumber, or the loading of the wine, excuse the failure of the vessel to put herself in a condition to receive the barilla.

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It follows, therefore, that the libellants are not entitled to dead freight, or damages in lieu of freight, on the barilla. Nor are they entitled to damages for loss of time, or expenses incurred by the deviation to St. Thomas on the homeward voyage, as the deviation was not caused by any act or omission of the respondent.

I do not see how the respondent can refuse to pay the freight on the wine, after having accepted it. His agreement is to pay so much per one thousand feet freight on the lumber, on its delivery at the Islands, and so much per ton freight on the barilla, and per pipe freight on the wine, on proper delivery. When the lumber was delivered, the freight on it was paid. This is a practical construction of the contract by the respondent. Freight is to be paid, at the agreed rate, on whatever cargo is delivered. Freight is due on the wine, although no barilla was brought. Indeed, the answer does not set up that freight was not earned on the wine. The effect of the answer, in this respect, is merely to claim damages to an extent sufficient to absorb any claim of the libellants. The respondent is entitled to set off or recoup against the freight due to the libellants on the wine, any damage set up in the answer, which he can prove to have arisen out of any breach of the charter party by the libellants, to the extent of the freight, but, for any claim beyond that, the respondent must resort to his own proper action (*Zerega v. Poppe*, 1 *Abbott's Adm. Rep.*, 401; *Thatcher v. McCulloh*, *Olcott's Rep.*, 371; *Bradstreet v. Heran*, 2 *Blatchf. C. C. R.*, 116.) The freight to which the libellants are entitled, is the sum of \$100, with interest from the time the wine was delivered, without reference to the provision of the charter party in regard to gold.

A decree will be entered accordingly.

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In the Matter of Charles H. McIntire, a Bankrupt.

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APRIL, 1868.

IN THE MATTER OF CHARLES H. MCINTIRE, A  
BANKRUPT.

## SETTING ASIDE DISCHARGE.—LACHES.—VAGUE SPECIFICATIONS.

Where specifications of objection to a bankrupt's discharge had been filed, which were too vague to be triable, and no application was made to amend them, and a discharge was granted, and the creditor, about a month afterward applied, on petition, to have the discharge set aside, and for leave to file amended specifications:

*Held*, That the creditor was chargeable with laches.

That no specific ground of opposition to the discharge was made to appear in the petition, and the discharge could not be impeached on such vague averments; and that, on the evidence, there was no ground to believe that the bankrupt had failed to insert all his property in his schedules, or to deliver it to his assignee.

In this case a discharge was granted to the bankrupt on the 24th of February, 1868. About a month afterward, this petition was presented to the court, in behalf of a creditor, praying that the discharge might be set aside, and that the creditor might be allowed to file amended specifications of opposition to the discharge. Specifications of objection had been filed in his behalf, which were, however, too vague to be triable, within the rules laid down in previous decisions of this court. Those decisions were known to the attorney for the creditor, but no application was made in his behalf for leave to amend the specifications, until the present motion was made.

*F. C. Nye*, for the bankrupt.

*Salter & Coving*, for the creditor.

BLATCHFORD, J.—1. The proceedings in this case were regular, and the discharge was properly granted.

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In the Matter of Charles H. McIntire, a Bankrupt.

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The specifications of grounds of opposition to the discharge were too vague and general to be triable. The attorney for the creditor had ample opportunity, after the decisions of the court on the question of the sufficiency of specifications were made, and before the discharge in this case was granted, to apply to the court for leave to amend the specifications, and the facts in evidence show that he was guilty of laches in not doing so, after his attention was called to their probable insufficiency.

2. If there had been no laches in the case, still the petition now presented, that the discharge be vacated, and that the creditor be allowed to file amended specifications and oppose the discharge, sets forth no specific ground of opposition. It is as vague as were the specifications filed. It merely sets forth that the attorney for the creditor believes that, if the case is tried on its merits, it can be shown that the bankrupt has a large amount of personal property which he has not put into his schedule of assets, or passed over to the assignee in the case. Even if this is to be regarded as an averment that the bankrupt had such property when he filed his petition, it is too vague to found any action of the court upon. The discharge would have been granted notwithstanding so vague a specification, and, having been granted, it cannot be impeached on a petition containing only so vague an averment.

3. I have looked into the testimony of the bankrupt taken before the register in this case, and his testimony taken on the supplemental proceedings in the State court, and can see no ground for questioning the *bona fides*, fairness or validity of the transfer of his property to his brother, in August, 1862, and no reason to suppose the bankrupt failed to insert, in his schedule of assets, all the property he had at the time, or failed to deliver to his assignee all the property he was bound to deliver to him.

The prayer of the petition is denied.

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In the Matter of Oliver W. Dodge, a Bankrupt.

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APRIL, 1868.

**IN THE MATTER OF OLIVER W. DODGE, A  
BANKRUPT.****NO ASSETS.—FORM NO. THIRTY-FIVE.**

Where the assets of a bankrupt consisted of an interest in certain notes, from which the assignee in bankruptcy had collected nothing for more than sixty days after the adjudication of bankruptcy:

*Held*, That, "no assets" had come to the hands of the assignee, within the meaning of section twenty-nine of the Bankruptcy Act.

In this case the register certified to the court the following statement of facts and questions :

"The only assets of the bankrupt consist of certain notes, accounts, and claims, all past due and unpaid, in which he had a one-seventh interest, valued at \$250, which interest has passed to the assignee, Mr. John Sedgwick, who has not received or paid any moneys whatever for, or on account of, the bankrupt's estate.

"One or more creditors have proved their claims against the estate of the bankrupt.

"More than sixty days having elapsed since the adjudication of bankruptcy, can the bankrupt now apply to the court for his discharge, under section twenty-nine of the Act, on the ground that there are no assets? Are accounts, claims, and demands, from which nothing may be collected or realized, considered to be assets within the meaning of said section twenty-nine, so as to prevent the bankrupt from making application for his discharge until after the expiration of six months?"

BLATCHFORD, J.—Where, at the time of the application for a discharge, the assignee has neither received nor paid any moneys on account of the estate, the case

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In the Matter of Darius Tallman, a Bankrupt.

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is to be regarded as one in which no assets have come to his hands, within the meaning of section twenty-nine of the Act. This is the interpretation given to such expression, "no assets," by the justices of the Supreme Court. Form No. 35 is headed, "Assignee's return where there are no assets;" and that form consists merely of the oath of the assignee that he has "neither received nor paid any moneys on account of the estate."

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APRIL, 1868.

IN THE MATTER OF DARIUS TALLMAN, A  
BANKRUPT.

EVIDENCE.—FRAUDULENT DEBT.

Where, in bankruptcy proceedings before the register, one of the creditors offered evidence to show that his debt was fraudulently contracted by the bankrupt:  
*Held*, That the evidence was immaterial.

In this case one of the creditors offered evidence before the register, to show that his debt was fraudulently contracted by the bankrupt. The bankrupt objected to the evidence. The register, on request, certified the question of the admissibility of the evidence to the court, with the following opinion :

• "Under the thirty-third section of the Bankruptcy Act, the fact that the debt was created by fraud, does not constitute a ground of opposition to the discharge of the bankrupt ; and, as the examination of the bankrupt is for the purpose of ascertaining whether or not the bankrupt is entitled to a discharge under the Act, evidence of fraud in the creation of the debt is not admissible."

BLATCHFORD, J.—The register is correct in his view.



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In the Matter of William D. Hill, a Bankrupt.

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APRIL, 1868.

IN THE MATTER OF WILLIAM D. HILL, A  
BANKRUPT.

## FRAUD.—BANKRUPT DOING BUSINESS IN HIS WIFE'S NAME.

A bankrupt had married in 1860, his wife having then no property, and having inherited none subsequently, and received none except from her husband. In 1861, he failed in business, and from that time did business as agent, first for one M., and then for his wife, in whose name he transacted an extensive business:

*Held*, That, on the facts, a house and lot which stood in the name of the bankrupt's wife, was really his property; that he had been guilty of fraud in placing his property in his wife's hands, and had willfully sworn falsely in the bankruptcy proceedings; and that a discharge must be refused.

BLATCHFORD, J.—The discharge of the bankrupt is opposed by William S. Preston, a creditor. The specifications in opposition, filed by the creditor, aver that “the evidence taken before the register shows, beyond all reasonable doubt, that the bankrupt has willfully omitted from his sworn and filed schedules and inventories, property which, in truth and fact, belonged to him at the time of making and filing his said schedule and inventories, to wit, a certain house and lot, situate in the village of Kingston, claimed to have been purchased by his wife of Jeremiah Russell, a certain promissory note, made by one McKinstry, for \$1,000, one of Jeremiah Green, one of H. S. Van Etten, and other notes, in addition to bonds, mortgages, and other evidences of debt and property, which will more fully appear from the evidence taken; that the said bankrupt, with intent to defraud his creditors, has fraudulently placed his property in the hands of his wife, with intent to prevent it from being reached by his creditors, and applied in satisfaction of their debts, and that his wife

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In the Matter of William D. Hill, a Bankrupt.

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so held his property at the time of filing the petition aforesaid; that the said bankrupt has withheld his books, papers, and documents, relating to his business; that he has omitted from his schedules all claims and demands which he has against his wife, for services rendered for her as her agent, if, in fact, he was such agent, and which, in equity, belong to the creditors, and are unpaid for."

The bankrupt and his wife, and other witnesses, have been examined. I have carefully gone over their testimony, and am entirely satisfied that the allegations of the specifications above referred to, are fully proved. The case is one of a deliberate attempt, by the bankrupt, to defraud his creditors, and yet procure a discharge from his debts. He has willfully sworn falsely in his affidavit annexed to his inventory of property, and, on his examination before the register, in the course of the proceedings in bankruptcy, in regard to material facts concerning the property owned by him at the time of filing his petition in bankruptcy, he has concealed his property by covering it up in the name of his wife, and has been guilty of fraud, contrary to the Bankruptcy Act, by not delivering to his assignee property which belonged to him at the time of presenting his petition and inventory, and which he was not permitted to retain under the provisions of the Act, and has made a fraudulent gift or transfer of property to his wife, contrary to the provisions of the Act. He has committed all these offences, which are made grounds, by section twenty-nine of the Act, for withholding his discharge, and then he has crowned the whole by taking and subscribing the oath required by section twenty-nine, to the effect that he has not done, suffered, or been privy to, any act, matter, or thing, specified in the Act, as a ground for withholding his discharge.

In his inventory of his estate, annexed to his petition, he sets forth that he has no property except \$200 worth of property, that is exempted by section fourteen of the

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In the Matter of William D. Hill, a Bankrupt.

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Act ; and his assignee makes a return of no assets. The evidence shows that the bankrupt claims to have done business for several years past as agent for other persons, and not on his own behalf, first, as agent for one McMullen, and afterward, and down to the time of filing his petition, as agent of, and in behalf of, his wife. The testimony, and particularly the examination of the bankrupt and of his wife, shows that these pretended agencies, and especially the one for his wife, were mere shams and covers for fraud. The prevarications of the bankrupt in his testimony, his reluctance to disclose the truth, his want of recollection as to matters which he could not well have forgotten, and his failure to give any satisfactory explanation of the terms of his agencies, and of the nature and amount of his compensation as agent, all tend to show, beyond question, that the whole arrangement was one devised and carried out to defraud his creditors, and that the bulk of the property which stood in the name of, and was in the possession of, his wife, at the time his petition was filed, was, in fact, his own property. The attempt to show that his wife derived the property from any other source than from him, utterly failed. The debts set forth in his schedule were, all of them, contracted in 1861. He was married in 1860. His wife had then no property, except some household furniture, of the value of \$225, which he purchased and gave to her before their marriage. She has inherited no property since, nor received any from any other person than her husband. In September, 1861, he failed, and made an assignment of all his property for the benefit of his creditors. Since that time he has carried on business as agent for McMullen and for his wife. His wife's furniture was sold in 1864 for \$600. The attempt to show that Mrs. Hill had capital enough growing out of the investment of this \$600, and the buying of notes on her behalf, prior to the 18th of April, 1867, and the transactions on her behalf with John Grant, in regard to mules, prior to that time, to establish the extensive business

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In the Matter of William D. Hill, a Bankrupt.

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which, from and after that date, was done for her by her husband as her agent, is absurd. At that date a bank account was opened in her name with the Ulster County National Bank at Kingston, and her husband's agency for McMullen ceased about the same time. It is quite clear that the capital was really the property of her husband, and was the fruit of the business he had been transacting since he failed in 1861, nominally as agent for McMullen, but really on his own behalf. Mrs. Hill, in her testimony, shows that she knew nothing about what her husband was doing in her name in the way of business, and that she had no connection with it except to sign notes and checks as he brought them to her, filled up and ready to be signed. From April, 1867, to January, 1868, the deposits in the name of Mrs. Hill, in the bank, amounted to nearly \$25,000; and Hill testifies that a large amount of her transactions do not appear upon her bank book, that some of the notes he bought for her were discounted at other banks, and that he bought about \$50,000 worth of notes, as her agent, and dealt largely in other things as her agent, buying and selling mostly for cash. The house named in the specifications was purchased from Jeremiah Russell for \$5,750, in the fall of 1866. Of this amount, \$1,750 was paid in cash, being raised on a note signed by Mrs. Hill, and she took a deed of the house, and gave back a mortgage on it for \$4,000. But the evidence as to the transaction shows that the purchase was really by her husband, and that the note on which the money was raised to make the cash payment, was paid with his money, if it has been paid. The bankrupt has kept no account of his dealings for his wife, as her agent, and has never rendered to her any account, and she has never paid him, or agreed to pay him, any thing for his services. The case is a plain one for refusing a discharge.

*Cooke & Lounsbury*, for the bankrupt.

*William Lawton*, for the creditor.

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The Propeller Jack Jewett.

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APRIL, 1868.

## THE PROPELLER JACK JEWETT.

POSSESSORY ACTION.—DISCONTINUANCE.—DELIVERY OF PROPERTY BY  
THE MARSHAL.

Where a possessory libel was filed by one B., claiming to be the owner of a propeller, and that she had been taken from him by H. and others, and process was issued against the propeller, and against such persons, under which process the marshal, on March 2d, 1868, took possession of the vessel, taking her by force from the representative of H. and the others, who claimed to hold her by bills of sale and mortgages, and, on March 10th, no appearance having been entered in the cause, the libellant discontinued the suit, and the clerk of the court notified the marshal to discharge the vessel from custody, whereupon the marshal withdrew from the vessel, and B., who had been allowed by the marshal to come on board the vessel, took possession of her, and took her out of the district, and thereafter H. and the others presented a petition to the court praying that the marshal might be directed to restore the vessel to the petitioners, from whom he had taken her:

*Held*, That, the suit having been discontinued, the court had no longer any possession of the vessel, or jurisdiction of the suit, or power to grant the relief prayed for.

The libel in this case was filed on the 2d of March, 1868. The action was one for the possession of the propeller Jack Jewett, the libellant, John M. Burt, claiming to be her owner. The libel set forth that Willet P. Roe, George W. Holman, and Frederick Thompson, with other persons, had deprived the libellant forcibly of the possession of the vessel, and prayed process against the vessel, and that Holman, Thompson, and Roe, and all persons intervening for their interest therein, might be cited to appear and answer the libel, and that the vessel might be delivered to the libellant, and that Holman, Thompson, and Roe might be condemned to pay the libellant his damages and costs in the premises. On this libel process was issued from this court, on the 2d

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The Propeller Jack Jewett.

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of March, 1868, as prayed for, returnable on the 24th of March, 1868. When the deputy marshal went to the vessel to execute the process, he found her at the Atlantic Basin, in Brooklyn, in possession of one Strauss, a general deputy of the sheriff of Kings County, who claimed to hold her on behalf of the said Holman, Thompson, and Roe, and of Stephen F. Shortland, Mary Newcomb, Benjamin G. Richardson, and David Waugh, under sundry bills of sale and mortgages. Strauss resisted the deputy marshal, and refused to yield possession of the vessel to him, or to an extra force which the marshal sent to reduce the vessel to custody. Thereupon the marshal obtained a file of marines from the navy yard, and by their aid took possession of the vessel, and removed her from the Atlantic Basin. He detained her in his custody until the 10th day of March, 1868, when the libellant discontinued his suit, and the usual notice was served by the clerk of the court on the marshal, notifying him that the suit had been discontinued, and that the costs of the clerk and marshal had been paid, and directing him to discharge the vessel from his custody as to the suit. Thereupon the deputy marshal withdrew from the vessel, and Burt, the libellant, being in possession of her by agents of his, whom the deputy marshal had suffered to go on board of her, took her away from the port of New York. There was no claim filed, nor any appearance entered in the suit. The parties for whom Strauss acted now presented a petition to the court, praying that the marshal might be directed to deliver the vessel to the petitioners, from whom she was taken by him under said process.

*T. C. T. Buckley and J. K. Hill*, for petitioners.

*T. Scudder*, for the marshal.

BLATCHFORD, J.—The difficulty in the way of granting to the petitioners the relief asked is, that the suit is

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The Propeller Jack Jewett.

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discontinued. The vessel has been released from custody. The marshal was authorized to release her. The only complaint is that he gave her up to the wrong person. The court has no longer any possession of the vessel, or any jurisdiction of the suit, either *in rem* against the vessel, or *in personam* against such of the petitioners as were parties to it, and has no power to give the relief asked. The marshal has not disobeyed any process or order of the court, or been guilty of any contempt of court for which he can be attached, and that is not the relief asked. If the marshal, while the vessel was in his custody, suffered her to be injured, or has been guilty of a breach of duty in permitting the libellant to take possession of her, and in not delivering her back to the custody of those from whose possession he took her, the parties aggrieved have their remedy against him by a proper action in the proper tribunal. This court cannot administer the relief asked in this summary way on this petition. This suit having been discontinued on the 10th of March, 1868, and the vessel discharged from the custody of the marshal by the order of this court, without any special direction to the marshal as to the person to whom he was to deliver the vessel, there is not, even if the marshal was guilty of a breach of duty in delivering her to the libellant, such an irregularity, or mistake, or fraud, as would warrant the court in retaking possession of the vessel, even if it could do so in any case where the suit was regularly discontinued. By the discontinuance of the suit, the lien on the vessel is gone, and for the court now to order the marshal to seize her, when there is no suit pending, and no jurisdiction in the court over any thing or any person in the premises, would seem to be to order the marshal to commit a naked trespass, in respect to which the order of this court would be no protection to him if he were sued therefor. The principle which the Circuit Court for this district laid down in the cases of *The Union* and *The*

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United States v. Bloomgart.

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White Squall (4 *Blatchf. C. C. R.* 90, 103), as applicable to the case of a discharge of a vessel on a stipulation for value in a suit *in rem*, that the court has no power to order back, into the custody of the marshal, a vessel which has, on a stipulation, been fairly discharged from arrest, applies, *a fortiori*, to a case where she has been properly discharged by the termination of the suit.

The prayer of the petition is denied.

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APRIL, 1868.

### THE UNITED STATES v. JOSEPH BLOOMGART.

#### EVIDENCE ON AN EXAMINATION BEFORE A UNITED STATES COMMISSIONER.—CONFESSIONS.—OFFICER OF THE UNITED STATES.

On an examination, before a United States commissioner, of a person charged with crime, his confession of the crime, without any proof of the *corpus delicti*, is sufficient to warrant his being held for trial.

A clerk, appointed by the direction and with the approbation of the Secretary of the Treasury, for the fractional currency counter of the Treasury Department, at Louisville, is an officer of the United States, within the meaning of, the Constitution of the United States, and of the statutes of the United States in regard to officers charged with the safe keeping of the public money.

BLATCHFORD, J.—This case comes before the court on a writ of *habeas corpus*, and a writ of *certiorari*, the *habeas corpus* being issued to the marshal of this district, directing him to bring up the prisoner, and the *certiorari* being issued to John A. Osborn, a commissioner of the Circuit Court of the United States for this district, to bring before the court the proceedings before him under which the prisoner was committed. It appears that, on the 23d of March, 1868, a warrant was issued by Mr. Osborn, as such commissioner, to the marshal of this district, against Joseph Bloomgart, reciting that complaint on



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oath had been made, charging Bloomgart with having, on the 7th of December, 1867, in the district of Kentucky, knowingly, willfully, and feloniously taken and converted to his own use, and embezzled, the sum of \$12,275, the property of the United States, he being then an officer of the United States, and intrusted with the depositing and safe keeping of the public money. That warrant commanded the marshal to apprehend Bloomgart, if found in this district, and bring him before the commissioner, and appears to have been issued by the commissioner on an affidavit made by Mr. Hervey, acting United States depository at Louisville, Kentucky, and sworn to in the district of Kentucky, before a United States commissioner there, on the 3d of February, 1868. Mr. Hervey states, on oath, that, during the past eight months, one Joseph Bloomgart, a clerk at the fractional currency counter of the Treasury Department, at Louisville, did take and convert to his own use \$12,275 of the public money intrusted to him, contrary to the Act of Congress in such case made and provided. On this warrant, Bloomgart was arrested and taken before Commissioner Osborn, and the commissioner had an examination of him, in which testimony was introduced on the part of the Government, and the commissioner, on the 10th of April, 1868, committed the prisoner for trial in the district of Kentucky, the place where the offence was committed, and directed that he should be committed to the custody of the marshal of this district, to be by him held until this court should order his removal, or otherwise to be dealt with according to law. His discharge is now applied for, under the *habeas corpus*, on the ground that sufficient evidence was not produced before the commissioner to warrant his committal, or to warrant his being sent to Kentucky for trial, under the Act of Congress.

It appeared in evidence, before the commissioner, that a warrant was issued in Kentucky, on the 28th of

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March last, by a United States commissioner there, to the marshal of Kentucky, reciting that information upon oath had been given to him, that Bloomgart had committed an offence in the district of Kentucky, to wit, that he, being an officer of the United States, at the fractional currency counter of the Treasury Department, in Louisville, and intrusted with the safe keeping of the public money of the United States, did, while intrusted with such charge, convert a large sum of the same to his own use, contrary to the statutes of the United States. Such warrant commanded the marshal to arrest him, and bring him before the commissioner.

An official letter of appointment from the Treasury Department, signed by the Assistant Secretary of the Treasury, was put in evidence before Commissioner Osborn, showing that Bloomgart was appointed a clerk at the fractional currency counter of the Treasury Department in Louisville, on the 10th of October, 1866, by the direction and with the approbation of the Secretary of the Treasury. Under the decision of the Supreme Court, in the case of *The United States v. Hartwell* (6 Wall., 385), this appointment constituted Bloomgart an officer of the United States. Where, with the sanction of the head of a department, a person is appointed an officer of the United States for the safe keeping of public money, such appointment constitutes him such officer, within the meaning of the Constitution of the United States, and of the statutes of the United States in regard to officers charged with the safe keeping of the public money.

The only question now is, whether probable cause was shown for his commitment,—probable cause to show that he is guilty of the offence charged against him. In addition to the affidavit of Mr. Hervey, the evidence, and, it may be said, the only evidence on the subject, appears to be two papers, which are proved to be in the handwriting of Bloomgart himself, in which he enters with

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great particularity into the details and circumstances of the embezzlement, showing when it commenced, how it was carried on, and the purpose for which it was committed. They are both signed by Bloomgart, they are autographic manuscripts, and, if they are to be believed, they clearly show that he has been guilty of the offence charged. His discharge is claimed on the ground, that, if he were on trial under an indictment before a jury, the same rule of law would apply to his case as to all other criminal cases—that the *corpus delicti*, the fact that an offence was committed, the stealing of the Government money, must be proved independently of the confession of the prisoner (*The People v. Hennessey*, 15 *Wend.*, 147). But, whatever the principle of law is, as regards a trial before a jury, I have come to the conclusion, after a careful examination of the authorities, and looking at the case as if I myself were the examining and committing magistrate, that the principle invoked does not apply to the question of a commitment, and that this is a proper case in which to hold the prisoner for trial, and send him to Kentucky. I do this on the decision of the most learned and eminent judge who has adorned the bench in this country—Chief Justice Marshall—and on the authority of the most important criminal case which the Federal judiciary has ever had to deal with—the case of Aaron Burr—in which the evidence on which the prisoner was held for trial was identical with that in this case. As this is an important question, I have thought that the law should be carefully laid down for the guidance of United States commissioners, because the doctrine urged in this case on the part of the prisoner is not sound, as respects the question of commitment.

In the case of Burr, an application was made at Richmond, before the Chief Justice, sitting as a committing magistrate, and acting, so to speak, as a United States commissioner, to commit Colonel Burr for trial, on two charges. One charge was, setting on foot and providing

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the means for an expedition against the territories of a nation at peace with the United States. The other charge was a charge of high treason. The sole evidence on which the district attorney asked to have Colonel Burr committed on the first charge—that of setting on foot and providing the means for an expedition against the territories of a nation at peace with the United States—was an affidavit made by General Wilkinson, setting forth, in very general terms, that Colonel Burr had been guilty of the offence; and he embodied in his affidavit, as the main piece of evidence against Colonel Burr, an interpretation or translation of a letter in cypher received from Colonel Burr. The original letter in cypher was not produced, nor a copy of it, nor the key to the cypher, but merely the translation. The affidavit of General Wilkinson is to be found at length in the Appendix to the fourth volume of Cranch's Reports. There was no proof of any expedition having been undertaken or set on foot, except what was contained in the affidavit of General Wilkinson. The Attorney for the United States urged the commitment of Colonel Burr on the strength of this letter addressed to General Wilkinson, and insisted that it showed probable cause to suspect him of having committed the offence. The counsel for Colonel Burr contested the propriety and effect of the evidence relied on by the Attorney for the United States, and Colonel Burr himself, also, argued on his own behalf. The Attorney General of the United States said, that the counsel for Colonel Burr had argued as if they were then before a jury upon the principal trial, but that the law required no such plenary testimony in the incipient stage of the proceedings; that, to show probable cause to authorize a commitment, *ex parte* testimony and *ex parte* evidence of a confession were admissible, and, unless it manifestly appeared that he was innocent, he ought to be committed; whereas, before a jury, such testimony would be excluded, and his innocence would be

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presumed till his guilt appeared. Chief Justice Marshall, in the opinion delivered by him on the question, after reciting the two charges, uses, in regard to the first charge, the following language (1 *Burr's Trial*, 11): "On an application of this kind, I certainly should not require that proof which would be necessary to convict the person to be committed, on a trial in chief; nor should I even require that which should absolutely convince my own mind of the guilt of the accused; but I ought to require, and I should require, that probable cause be shown; and I understand probable cause to be a case made out by proof, furnishing good reason to believe that the crime alleged has been committed by the person charged with having committed it." He then proceeds to discuss the evidence in the case as to the first charge, and says, of the affidavit of General Wilkinson: "To make the testimony of General Wilkinson bear on Colonel Burr, it is necessary to consider as genuine the letter stated by the former to be, as nearly as he can make it, an interpretation of one received in cypher from the latter. Exclude this letter, and nothing remains in the testimony which can, in the most remote degree, affect Colonel Burr." He then held, that, upon a mere question whether the accused should be brought to trial or not, upon an inquiry not into the guilt, but into the probable cause, the affidavit of General Wilkinson, embracing the letter from Colonel Burr, was sufficient to warrant the commitment of the accused for trial. This decision was put by him solely on the ground that the expressions in that letter furnished probable cause for believing that the means for the expedition had been provided by the accused.

The evidence in the present case is quite as full, to show that there is probable cause for supposing the prisoner to be guilty of the charge, on this written confession. The confession is very circumstantial and detailed. It shows that he took the Government money,

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and for what purpose he took it. I have no doubt that this is a proper case in which to hold the accused for trial. If the offence had been committed in this district, the evidence would be sufficient to commit him to await the action of a grand jury. The only place where he can be tried is the district of Kentucky, where the offence was committed. The application to discharge the prisoner is refused, the writ of *habeas corpus* is vacated, and a warrant must be issued, under the thirty-third section of the Act of September 24th, 1789 (1 *U. S. Stat. at Large*, 91), to the marshal of this District, to remove the prisoner to the district of Kentucky.

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APRIL, 1868.

## THE UNITED STATES v. THE UNITED STATES TELEGRAPH COMPANY.

### DUTY ON TELEGRAPH CABLE.—ENUMERATED ARTICLES.

Telegraph cable, composed of iron-wire and gutta-percha, iron being the material of chief value, is embraced in the words of the twenty-second section of the Tariff Act of March 2d, 1861 (12 *U. S. Stat.* 192), and the thirteenth section of the Act of July 14th, 1862 (*Id.* 557), as a manufacture, not otherwise provided for, of which iron is the component material of chief value.

It is, therefore, not embraced within the provision of the twentieth section of the Act of August 30th, 1842 (5 *U. S. Stat.* 565), which provides, that, on non-enumerated articles, manufactured from different materials, the highest duty shall be assessed which is chargeable upon any of their component parts.

Such telegraph cable, therefore, was held to be chargeable with thirty-five per cent. duty, notwithstanding the fact that gutta-percha was chargeable with forty per cent.

BLATCHFORD, J. This is an action to recover \$542.30, with interest from January 17th, 1865, alleged to be due to the United States, for duties on a quantity of telegraphic cable imported into the United States by the defendants. The article is composed of iron-wire and

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gutta-percha, and, in its manufactured state, iron is its component material of chief value. On the entry of the article, a duty of thirty-five per cent., *ad valorem*, was imposed, and paid upon it, under section twenty-two of the Act of March 2d, 1861 (12 *U. S. Stat. at Large*, 192), which imposes a duty of thirty per cent. on "manufactures, articles, vessels, and wares not otherwise provided for, of brass, copper, gold, iron, lead, pewter, platina, silver, tin, or other metal, or of which either of these metals, or any other metal, shall be the component material of chief value," and under section thirteen of the Act of July 14th, 1862 (*Id.*, 557), which, in addition to the duties theretofore imposed by law, imposes a duty of five per cent., *ad valorem*, on "manufactures, articles, vessels, and wares not otherwise provided for, of gold, silver, copper, brass, iron, steel, lead, pewter, tin, or other metal, or of which either of these metals, or any other metal, shall be the component material of chief value." The words, "otherwise provided for," mean otherwise provided for among enumerated articles, by being classed under a description contained in an enumeration of articles (*Morlot v. Lawrence*, 1 *Blatchf. C. C. R.*, 608, 611). The article in question here is not included in any enumeration of articles in any Tariff Act existing at the time it was imported, except in such enumerations in the Acts of March 2d, 1861, and July 14th, 1862. It would, therefore, seem, as iron is its component material of chief value, to be liable to a duty of thirty-five per cent., *ad valorem*, and no more. But the United States claim that it is liable to a duty of forty per cent., *ad valorem*, on the ground that the twentieth section of the Act of August 30th, 1842 (5 *U. S. Stat. at Large*, 565), provides, that, on all nonenumerated articles "manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of its component parts may be chargeable," and that, by the thirteenth section of the Act of June 30th, 1864 (13 *Id.*, 214), a duty of forty per

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cent., *ad valorem*, is imposed on "gutta-percha manufactured." This suit is brought to recover the difference between the thirty-five per cent. paid and the forty per cent., and, at the trial, a verdict was taken for the plaintiffs, subject to the opinion of the court.

It is claimed, on the part of the United States, that, as there is not in the Tariff Acts any duty imposed on telegraphic cable, by that name, or by any commercial designation applicable to the thing itself, it is, therefore, a nonenumerated article, and, as such, liable to the duty of forty per cent. claimed. This view would be sound, and the article would be liable to a duty of forty per cent., if it were a nonenumerated article. But it is not a nonenumerated article, and, therefore, the twentieth section of the Act of 1842 has no application to it. That section applies only where an article has not been otherwise provided for—that is, is not classed under a description contained in an enumeration of articles (*Lottimer v. Lawrence*, 1 *Blatchf. C. C. R.*, 613, 614). The article in question here is described in the twenty-second section of the Act of 1861, and the thirteenth section of the Act of 1862, and is classed under the description contained in the enumeration of articles in those sections, as an article of which iron is the component material of chief value. In *United States v. Clarke* (5 *Mason*, 30), *bombazine* was not named in the Tariff Act of 1824. It was a fabric composed of wool and silk. The Act imposed a duty of thirty per cent. on all manufactures of which wool was a component part (except worsted stuff goods and blankets); a duty of twenty-five per cent. on all manufactures of which silk was a component material, coming from beyond the Cape of Good Hope; a duty of twenty per cent. on all other manufactures of which silk was a component material; and a duty of fifteen per cent. on nonenumerated articles. The court held, that, under the Act, *bombazine* was not a nonenumerated article, but that it was doubly enumerated. Yet,



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the only enumeration of it was by speaking of it as an article of which wool was "a component part," or of which silk was "a component material." So, here, the telegraphic cable is enumerated, by speaking of it as an article of which iron is "the component material of chief value."

In the case of *Morlot v. Lawrence* (1 *Blatchf. C. C. R.*, 608), which is relied upon by the plaintiffs to sustain their claim to recover in this case, the article under consideration—linen lustres, &c., composed of linen and cotton—was not enumerated. It did not fall within any of the articles specially described in any Tariff Act. It was, therefore, a nonenumerated article, and, as such, the twentieth section of the Act of 1842 applied to it.

There must be a judgment for the defendant.

*B. K. Phelps* (*Assistant District Attorney*), for the plaintiffs.

*G. P. Lowrey*, for the defendant.

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## THE SCHOONER ELIZABETH ENGLISH.

COLLISION OFF BARNEGAT.—VESSEL CLOSE-HAULED, AND VESSEL FREE.  
—LOOKOUT.—LIGHTS.

Where the schooner E. was bound south from New York, heading S. W. by W., one point to windward of her proper course, and the schooner E. E. was bound to New York, heading N. E. by N., and the vessels came together, the E. E. striking the E. on her port bow, and each vessel claimed to have been close-hauled, and that the other had the wind free, and neither vessel showed a light, but the E. E. was seen from the E. at much greater distance than the E. was seen, and the E. claimed that the E. E. luffed on seeing her, and thus caused the collision:

*Held*, That, on the evidence, the E. E. was close-hauled, while the E. had the wind

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free, and that it was, therefore, the duty of the E. E. to keep her course, and the duty of the E. to avoid her.

That, as no light was shown by the E. till just before the collision, and the luff, which it was claimed the E. E. made, was sworn to have taken place before the light was shown, while the evidence was, that, owing to a heavy cloud rising behind the E., she was not seen at all by the E. E. till the light was shown, the alleged luff was not established.

That the E. E. was not in fault in not seeing the E. sooner, under the circumstances.\*

BLATCHFORD, J. This is a libel for a collision which occurred on the 16th of February, 1858, between eight and nine o'clock P. M., about three miles southeast from Absecom Light, in the Atlantic Ocean, off the coast of New Jersey, between the schooner Ella, bound from New York to Chincoteague, in Virginia, and the schooner Elizabeth English, bound from Wilmington, in North Carolina, to New York. The proper course of the Ella, at the place of collision, was southwest, and she was heading, by compass, about southwest by west, or one point to the windward of her proper course. The proper course of the Elizabeth English was northeast, and she was heading about northeast by north, or one point to the windward of that course. It is contended by the Ella that the wind was west northwest, and that she was close-hauled, heading within five points of the wind on her starboard tack, and that the Elizabeth English had the wind at least two points free; while it is claimed by the Elizabeth English, that the wind was north northwest, or a little farther to the north than that, and that she was close-hauled, heading within five points of the wind on her port tack, and that the Ella had the wind at least three points free. The Ella was struck on her port bow by the Elizabeth English, and sank very soon, the mate of the Ella being killed or lost in the collision. The horizon was very dark toward the northward and eastward, as seen from the Elizabeth English, while it

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\* This decision was affirmed by the Circuit Court on appeal, in March, 1870.

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was lighter toward the southward and westward, as seen from the Ella. The Elizabeth English had no light, but she was seen from the Ella at some distance off, her master says, at two hundred to three hundred yards off. When the persons on board of the Ella caught sight of the Elizabeth English, the Ella had no light. She had previously been exhibiting a light, but it had gone out, and the steward was in the cabin at the time putting the light in order. The master of the Ella was at the wheel of the Ella when he first saw the Elizabeth English. To his eye, and in his judgment, the Elizabeth English was then to the leeward of the Ella, for he says that he then thought that, if the Elizabeth English kept her course, she would go clear of the Ella, to the leeward of her. He also says, that when the Elizabeth English was within one hundred and fifty yards of the Ella, he, the master, noticed that the Elizabeth English was luffing toward the Ella; that he then began to think there was danger of a collision; that he then immediately called into the cabin to the steward, and directed him to hurry on deck with the light; and that the steward then came up on deck with the light, and took it forward, where it could be seen. He also says that he kept the Ella on her course from the time he first sighted the Elizabeth English until the collision. Now, it is fully established by the evidence of those on board of the Elizabeth English, that nothing was, or could be seen, by them, of the Ella, until her light was discerned, which was almost at the moment of collision, and was so short a time before it, that, although the instant the light was seen, an order was given and obeyed, to port the helm of the Elizabeth English, her helm was not got over, nor was her course at all changed, before the crash came. This clearly shows that the Elizabeth English did not luff. Yet, to the master of the Ella, the other vessel presented the appearance of luffing. This appearance, I am satisfied, on the evidence, arose from the fact that the Ella was not kept on her

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course, but was suffered by her master to fall off, with the wind, toward the Elizabeth English. This appearance of luffing on the part of the latter vessel presented itself before the Ella or her light was seen, and before the Elizabeth English had any motive to make, or did make, any movement to alter her course. A good lookout was kept on the Elizabeth English, and the light on the Ella was seen as soon as it possibly could be, and when it was too late for the Elizabeth English to do any thing to avoid the collision. She was, therefore, not at all in fault. Her not showing a light did not at all contribute to the collision, for she was plainly seen by the Ella, in season for the Ella to have exhibited her own light, or to have insured an avoidance of the collision by keeping her course. The Ella failed to show a light. Such failure prevented her position from being made known to the Elizabeth English, in season for her to have ported her helm sooner than she did. According to the testimony of the master of the Ella, the Elizabeth English being to the leeward when first seen, if her helm had been ported sooner than it was (and the presumption, from what was, in fact, done, is, that it would have been, if the light of the Ella had been sooner seen), she would have gone still further to the leeward, and there would have been no collision, even with the change of course to the leeward which the Ella made by falling off. The Ella was in fault in falling off with the wind, when her master clearly saw that, if he kept his course, the Elizabeth English would go clear of him to the leeward.

The view thus taken is entirely independent of the question as to whether the wind was west northwest, as claimed by the Ella, or north northwest, as claimed by the Elizabeth English, and of the question as to which of the two vessels had the wind free. But I am satisfied that the weight of the evidence is, that the Elizabeth English was close-hauled, and that the Ella had the wind from two to three points free. This being so, the Elizabeth

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English was entitled to the right of way, and to keep her course, even though she was on the port tack, and it was the duty of the *Ella*, seeing the other vessel nearly ahead, and having herself the wind free, to put her helm a-port, even though she was on the starboard tack (*The George*, 5 *Notes of Cases*, 368). Instead of doing this, the *Ella* did the very opposite, and bore down against the other vessel, and brought upon herself the calamity which ensued. The collision occurred wholly from the incompetence and mismanagement of the master of the *Ella*.

There must be a decree dismissing the libel, with costs.

*C. Donohue* and *W. J. Haskett*, for the libellant.

*Benedict & Benedict*, for the claimant.

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APRIL, 1868.

## IN THE MATTER OF WILLIAM H. MAGIE, A BANKRUPT.

### JURISDICTION.—PLACE OF RESIDENCE.—DOING BUSINESS.

Where a bankrupt filed a petition in bankruptcy in this district, not averring any place of residence, and, on his examination, it appeared that he resided with his father, in New Jersey, and had done so since he came from Chicago, four years previous, that he had been engaged in looking after a private matter, with a view to returning to Chicago, and that, for about six months back, he had been keeping books for a firm in New York city, and, thereupon, the register declined to make an adjudication of bankruptcy, as having no jurisdiction of the case: *Held*, That the register's decision was correct.

In this case, a petition in bankruptcy was filed by the bankrupt on March 3d, 1868, which was referred to a register. It stated that he had been "a general agent and clerk for twelve months next immediately preceding the filing of the petition, at New York city." The register

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examined the petitioner on oath, and he deposed that he resided with his father, in New Jersey, and had done so since he came from Chicago, Illinois, about four years before, where he had been in business ; that he had been engaged in looking after a personal matter since he came from Chicago, with the intent of returning there ; and that, since about the middle of October, 1867, he had been engaged in keeping books with a firm in New York city, but had not been engaged with any other persons in New York city, nor had any business connection save as thus stated, nor been engaged in business otherwise for himself.

The register thereupon declined to make an adjudication of bankruptcy, on the ground that this court had no jurisdiction of the case, inasmuch as the petition was not "addressed to the judge of the judicial district in which such debtor has resided, or carried on business, for the six months next immediately preceding the time of filing such petition."

On request of the bankrupt, the question was certified to the court.

BLATCHFORD, J. I think the register was correct in his decision. The principles laid down by this court, in *In re Kinsman* (1 *N. Y. Legal Observer*, p. 309), in reference to a kindred provision in the Bankruptcy Act of 1841, make it improper for this court to assume jurisdiction in this case.

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The Steamship Louisiana.

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## THE STEAMSHIP LOUISIANA.

COLLISION OFF THE IRISH COAST.—STEAMER AND SAILING VESSEL.—  
DARKNESS.—SPEED.—VESSEL APPROACHED FROM BEHIND SHOULD  
SHOW A LIGHT.—PORTING IN HASTE.

Where, on a dark night, a bark, close-hauled on her starboard tack, heading S. W. by W., having proper lights set, and making no change of her course, was struck on her port side by a steamer, which came from a direction abaft the bark's beam :

*Held*, That, *prima facie*, the steamer was in fault, and the burden was on her of showing the contrary.

Where a steamer was running seven and a half knots an hour, heading W. by N. half N., having two men on the lookout, an officer on the bridge, and two men at the wheel, and a red light suddenly came in sight, bearing two points on the starboard bow, and the helm was at once put hard-a-port, and her engines were slowed, stopped, and backed, and the course of the steamer changed a point, but the officer, finding that a collision was inevitable, ordered the helm hard-a-starboard, with a view of lessening its effects, but, before the order could be obeyed, a collision took place with a bark, the witnesses testifying that the bark could not be seen sooner, owing to the haziness of the night, and the bark's lights being hid from view by her screens, in the direction from which the steamer approached :

*Held*, That it was sufficient, to show that the steamship was in fault, that she was running seven and a half knots an hour, on a coast where vessels were numerous, in weather so thick and hazy, that a red light, which came suddenly into view, was supposed by the officer in command to be half a mile off, but was, in fact, so near, that though her engines were immediately stopped and backed, the collision occurred.

That a steamship, when approaching another vessel so as to involve risk of collision, must slacken her speed, or, if necessary, stop and reverse; but it is a fault in her to change her course, in ignorance of the true course and position of the other vessel.

That this steamship was in fault in porting her helm in ignorance of the course and position of the other vessel, and that that fault contributed to the collision.

That the bark was also in fault, when she saw the steamship, as she did, approaching in such a direction that her regulation lights were not visible to the steamship, in not indicating her presence to the steamship by showing a visible light.

That the damages must, therefore, be apportioned.

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The Steamship Louisiana.

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BLATCHFORD, J. This is a libel for a collision, filed by Ferdinand L. Hansen and others, owners of the Prussian bark *Auguste Louise*, against the British steamship *Louisiana*. At the time of the collision the steamer was on a voyage from Queenstown, in Ireland, to New York, and the bark was bound from Queenstown to Tralee, on the west coast of Ireland. The collision occurred between nine and ten o'clock P. M., on the 5th of April, 1867, in the Atlantic Ocean, off the coast of Ireland, at a point about eight miles from Mizzenhead, a promontory on the southwest coast of Ireland. The bark was on her starboard tack, close-hauled, heading southwest by west, the wind being northwest by west. Her speed was about four knots an hour. She had her proper green and red regulation lights set and burning, the Prussian laws, on the subject of lights on vessels, being then and now the same as those of Great Britain and the United States. The steamer came from a direction abaft the beam of the bark on her port side, and the course of the bark was not at all changed down to the time of the collision. The steamer struck the bark nearly amidships, on her port side, and the bark soon sank, and was totally lost.

This statement of facts shows that the collision was, *prima facie*, the fault of the steamer, and the burden is thrown upon her of showing that she was not in fault. The case set up in the answer, is, that the weather was thick and hazy, thickening and lighting up at intervals; that the steamer had two men on the lookout forward, one on each bow, an officer on the bridge, and two men at the wheel; that the course of the steamer was west by north half north; that, while running on this course, and at a speed of seven and a half knots an hour, a red light came suddenly in sight, at but a short, although uncertain, distance, bearing two points on the starboard bow, its distance being supposed by the officer in command to be about half a mile, but being, in fact, much



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less; that the officer at once gave an order to put the steamer's helm hard-a-port, which was done, and her engines were almost immediately slowed, stopped, and backed at full speed, and the course of the steamer was changed one point; that, finding that the collision could not be avoided, and with a view of neutralizing its violence and the directness of the blow, the officer ordered the steamer's helm to be put hard-a-starboard, but, before that order could be obeyed, the collision took place; that, when the light was first seen, it was determined to be that of a sailing vessel, but, her sails not being in view, it was impossible to determine the exact course she was on, and the only course that could properly be adopted by the steamer was to port, and slow, stop and back, which was done, and the headway of the steamer almost, if not entirely, overcome; that, as the vessels approached each other very close, and at about the time they came in actual collision, it was discovered that the steamer was following the bark, coming up and angling toward her port quarter; that, when the lights of the steamer were first seen by those on board of the bark, at the distance of two miles, the lights of the steamer bore from the bark about six points abaft the beam, and bore, substantially, that position, up to about the time of the collision; that the lights of the bark were hidden from the steamer by the screens and sails, so that they could not be seen until too near to avoid the collision; that the collision was not caused by the fault or negligence of those on board of the steamer; and that, had those on board of the bark, when they saw a steamer approaching them on the port quarter, six points abaft the beam, given any indication of their whereabouts, as it was their duty to have done, the collision could easily have been avoided.

It needs no testimony, in addition to this answer, to establish the fault of the steamer. Here is a steamer, running at a speed of seven and a half knots an hour,

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in weather so thick and hazy, that a red light, on another vessel, which comes suddenly into view, is supposed by the officer in command to be about half a mile off, but is, in fact, much nearer, so near, that, although almost immediately the engines of the steamer are slowed, and stopped, and backed at full speed, a collision occurs, and the other vessel is run down by the steamer and sunk. This state of things alone is sufficient to show fault on the part of the steamer, causing the collision. Every steamship is bound, when in a fog, to go at a moderate speed, on peril of condemnation for damage caused by a collision, if she does not. The law on this subject, as deduced from settled decisions, was laid down by this court in the case of *The Steamboat D. S. Gregory* (*Ante*, p. 166), in these words: "No positive rate can be prescribed. What would be a moderate rate of speed under one state of facts, would be an immoderate one under another. A steam vessel must, in a fog, reduce her rate of speed to a moderate rate or abide the consequences of an immoderate one, unless some special reason is shown for maintaining the rate of speed adopted." "In such a fog her speed ought to have been as much less than it was, as would have been sufficient to enable her to avoid the vessel at anchor. She ought not to have gone so fast as not to have been able, by slowing, stopping and backing, to avoid a collision; and, if the fog was so thick, that, at the speed she had, with all the precautions she used, she could not avoid the collision, the conclusion is irresistible, that her speed was not that moderate speed in a fog which is required by the well settled rules of navigation." In the case of *The Great Eastern* (11 *Law Times Rep.*, new series, 5), in July, 1864, the judicial committee of the privy council lay down the law to be, that it is the duty of a steamer to proceed only at such a rate of speed as will enable her, after discovering a vessel meeting her, to stop and reverse her engines in sufficient time to prevent any collision taking place. In

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that case, every thing was done on board of the Great Eastern, after the other vessel was reported, that could be done, to avoid the collision, but without success. But the court held, that the speed of the Great Eastern was what rendered the contact inevitable, that she was to blame for such speed, and that it was her duty to proceed at no greater speed than, having regard to the state of the weather, made it possible to avoid the collision. The Supreme Court of the United States have held substantially the same view. In *Newton v. Stebbins* (10 *Howard*, 606), it is said, that it may be a matter of convenience that steam vessels should proceed with great rapidity, but the law will not justify them in proceeding with such rapidity, if the property and lives of other persons are thereby endangered. In *McCready v. Goldsmith* (18 *Howard*, 90), the court say, that no fixed and inflexible rule can be laid down as it respects the rate of speed of steam vessels navigating waters greatly frequented by vessels; that this must depend upon the circumstances attending each particular case; that these may justify a rate deemed prudent navigation at one time, that would be wholly unjustifiable at another; and that, in thick weather, and in a track where other water craft are usually to be met, a steam vessel must slacken her speed to such an extent as, with reference to the ability of discerning another vessel at the time, and the capacity of the steam vessel to control and stop her own forward movement, will enable her to avoid a collision. The same doctrine was held in *Rogers v. The St. Charles* (19 *Howard*, 108, 111).

Now, the case set up by this steamer as a defence, in her answer, is, that the weather was so thick and heavy, that, although she had a sufficient lookout, and used every precaution, by slowing, stopping, and reversing her engines, when she discovered the light of the bark, to avoid a collision, she could not do so, because she was so close upon the bark. The defence is the fault. The

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rules of navigation are now so well settled, that there is no excuse for the habitual and persistent disregard of them which appears in almost every case of collision where a steamer is concerned. But, as was said by the Supreme Court in *McCready v. Goldsmith* (18 *Howard*, 91), the only precautions which those in charge of a steam vessel seem to think they are bound to observe in navigation, are those which concern the safety of their own vessel. And even those precautions are too often disregarded, from a disposition to maintain unabated speed and take the risk of collisions.

In this case, the engineer in charge of the engines of the steamer testifies, that when he received a signal from the officer on deck, to stop the engines, he obeyed it immediately, by shutting off the steam; that the next signal, to back at full speed astern, followed immediately after the signal to stop, and was obeyed; that it took only a few seconds to put the engines at full speed astern, after the order; that about eight or nine revolutions astern had been made before the collision, the blow of which he felt; and that, with the speed of the steamer, and the sea and the weather such as they were at the time of the collision, it would, on a signal to stop and reverse at full speed, take about three minutes after the receipt of the signal to get sternway on the vessel. A speed of seven and a half miles an hour, is a mile in eight minutes, and three-eighths of a mile, or six hundred and sixty yards, in three minutes. The answer states, that when the light of the bark was seen, it was supposed by the officer in command to be half a mile off, but was, in fact, much less. That officer, Mills, in his testimony, says that he now thinks that, when he caught sight of the light, it was not more than one hundred and fifty or two hundred yards off, and that the speed of the steamer was seven and a half knots an hour. This steamer was, therefore, on the testimony of her own officers, running at a speed which required her

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to pass over a space of six hundred and sixty yards, or three-eighths of a mile, before she could, with every exertion, get sternway on from her full forward speed, in a night so thick and hazy that, with all proper lookouts, neither the hull nor the sails of a vessel could be seen at a greater distance than two hundred yards. She was doing this on a coast where vessels are numerous, and where the sudden coming up of fogs in intermittent banks is a frequent occurrence.

But there was another fault on the part of the steamer. The answer says, that, when the light of the bark was first made, it was determined to be that of a sailing vessel, but, her sails not being in view, it was impossible to determine her exact course, and that the helm of the steamer was at once put hard-a-port, and her course was changed one point. Mills says, in his testimony, that when he caught sight of the red light, he thought it was the light of a vessel crossing his bow from his starboard side to his port side—that is, the light of a vessel heading between southward and eastward, and not the light of one heading between southward and westward, and that, therefore, he ported; that if he had known at the time how the other vessel was heading, he would have starboarded instead of porting; that when he did find out how she was heading, he gave orders to starboard; that if, when he sighted the light, he had known which way the other vessel was heading, he would have cleared her; but that, when he did find out how she was heading, he was too close to her for starboarding to be of avail. Miller, who was at the wheel of the steamer, says that he received the order to put the helm hard-a-port, and obeyed it, and changed the course of the steamer one point, and then received an order to starboard, and got the wheel only partly over to starboard, when the collision took place. The starboarding did not affect the course of the steamer, and the order to starboard was given by Mills, when, and as

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soon as, he discovered the way in which the bark was heading. Therefore, the porting and the change of the steamer's course one point thereby, all took place before those in charge of the steamer had any knowledge of the true course of the bark, but after her light was sighted. A steamship, when approaching another vessel, so as to involve risk of collision, must slacken her speed, or, if necessary, stop and reverse, but it is a fault in her to change her course, in ignorance of the true course and position of the other vessel, if such fault contributes to a collision, even though she also stops and reverses. The steamer here did right in stopping and reversing, and appears to have done so promptly, but she did wrong in porting without knowing the course of the other vessel (The James Watt, 2 W. Rob. 270 ; The Northern Indiana, 3 Blatchf. C. C. R. 92, 108). Mills testifies, that if he had starboarded, instead of porting, he would have cleared the bark. It was not a fault not to starboard, but it was a fault to port. Did the porting contribute to the collision? I think it plain, on the evidence, that it did. The order to starboard was given almost at the moment of collision. At the time of the collision, the change by porting had been one point. Therefore, if the order to port had not been given, the course of the steamer would have been, at the time of the collision, one point more to the westward, than it was, in fact. The witnesses on the bark say, that the course of the steamer in striking was a little from aft, and the answer sets up that the steamer approached from six points abaft the beam of the bark. Mills testifies, that starboarding, instead of porting, would have cleared the bark. The change of course, by starboarding, would have been to the same extent, during the same time, as by porting, that is, one point. Consequently, by starboarding instead of porting, the steamer would, at the time of collision, have headed two points more to the westward than it did in fact. Now, if one point

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change to the westward, by starboarding, would, according to the testimony of Mills, have avoided the collision, it is clearly to be inferred, that no change at all, by porting, would also have avoided it, especially in view of the claim on the part of the steamer, that she approached from six points abaft the beam.

The only fault alleged against the bark is, that she did not indicate her whereabouts to the steamer, by some signal in addition to her red light. It is, I think, established, by the weight of evidence, that the red light of the bark came into the view of those on the steamer by its being opened to view suddenly as the steamer came up from aft, and not by its being made visible through the clearing away of haze or fog. This must be so, or else the testimony of those on board of the bark, that they saw the lights of the steamer for some time before she struck them, must be disbelieved. I am satisfied that the steamer's lights were seen from on board of the bark a considerable time before the red light of the bark was descried by the steamer. As soon as those on board of the bark perceived that there was real danger of collision, they blew a fog horn. But it is urged that they should have shown a light at the stern of the bark when they saw a steamer approaching from aft, from such a direction as to shut out from the steamer the view of the port light of the bark. I think this was the duty of the bark. The obligation upon the steamer, as a vessel overtaking the bark, to keep out of the way of the bark, did not relieve the bark herself from the obligation resting on her, on a night so dark as this was, from fog or haze, that the hull and sails of a vessel could not be seen at a greater distance than two hundred yards, and with a steamer, whose lights were seen for some considerable time, approaching from aft, in a line of direction very much the same as that in which the sails of the bark were braced, and from a quarter bod-ing danger, as evinced by the use, on the bark, of her

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fog horn, and when the bark must have known that her port light could not be seen by the steamer, and that, so far as the steamer was concerned, it was as if the bark had no light, to adopt the precautions required by the ordinary practice of seamen and the special circumstances of the case. Under the present regulations, it is the duty of those who see any chance of an approaching collision, to take all reasonable means, consistent with the regulations, to avoid it, such means depending on the circumstances of the case (*The Hannah Park v. The Lena, Holt's Rule of the Road*, p. 315, November, 1865). A proper precaution in this case, as is shown by the evidence, would have been the exhibition of a flash light or a blue light. That this would have been effective is shown by the evidence that the steamer's lights were seen from the bark at a distance so great, that if the steamer had seen a light exhibited from the bark at the time it ought to have been exhibited, the steamer would have been able to entirely stop her headway before reaching the bark. There is nothing in this view that violates the requirements that a sailing vessel, under way, shall carry only the green and red lights, nor is there any thing in the objection that the exhibition or flashing of a white or blue light might have caused the bark to have been mistaken for a fishing vessel, or an open boat, at anchor or stationary. All the requirements in regard to lights, and fog signals, and steering and sailing rules, must have a sensible construction; and it is expressly provided by one article, that nothing in the rules shall exonerate any vessel from the consequences of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case. The neglect of the bark was a fault which contributed to the collision, and the bark must be held to the consequences of that neglect. Her fault, however, does not excuse the fault of the steamer. There is nothing in the rules of naviga-



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tion that exonerates a vessel from the consequences of her violation of any of those rules, when such violation contributes to a collision. The violation of others of those rules, by the other colliding vessel, does not constitute such exoneration.

As both vessels were in fault, there must be a decree apportioning equally the damages caused to the libellants by the collision.

*C. M. Da Costa*, for the libellants.

*W. R. Beebe* and *C. Donohue*, for the claimants.

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## Eastern District of New York.

APRIL, 1868.

### JOSHUA ATKINS ET AL. *vs.* THE FIBRE DISINTEGRATING COMPANY.

CHARTER.—FREIGHT PER BUNDLE.—SECOND SAFE PORT.—MASTER'S AUTHORITY.

Where a vessel was chartered in New York for a voyage to Kingston, Jamaica, to load with a full cargo of bamboo, in bundles of a specified size, for freight payable per bundle, and it was specified in the charter that if the charterers did not have sufficient cargo to load her at Kingston, they were to have the privilege of sending her "to a second safe port," and the vessel went to Kingston and partly loaded, and was directed to go to Port Morant to complete her loading, and the bamboo with which she was loaded at both ports was in bundles of larger size than that specified in the charter, which the master received under protest, and the vessel, in coming out of Port Morant, owing to the land breeze dying away, as she was coming out through a narrow channel, there being no tugs in the port, nor any means of getting out except the land breeze, struck on one of the reefs which form the channel, and was seriously injured, and the owners sued on the charter to recover the damages sustained by the vessel and also the charter money:

*Held*, That the vessel was entitled to recover freight under the charter, at the rate

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specified in the charter, for as many bundles, of the size specified in the charter, as she could carry.

That the words "a second safe port," imply a port which this vessel could enter and depart from without legal restraint, and without incurring more than the ordinary perils of the seas; and that, on the facts, Port Morant was not such a port, and the master of the vessel would have been justified in refusing to go there.

But that, as he made no objection, but went without giving any notice of an intention to hold the charterers responsible for any injury that might arise from its unsafeness, he must be deemed to have waived the objection, and his action bound his owners, and they could not recover for the injury received by the vessel in coming out of the port.

This was an action in which the libellants, who were the owners of the ship *Elizabeth Hamilton*, sought to recover the sum of \$19,500, as the sum due them upon a charter of that vessel made with the respondents.

As to the contract there was no dispute. According to its terms the vessel was bound to proceed to Kingston, Jamaica, and there load for New York with a full cargo, both under and on deck, of bamboo, in bundles five feet long and two feet square, for which service she was to receive two dollars and a half per bundle, payable on proper delivery in New York.

It was also provided, that in case there should not be cargo enough at Kingston, the charterers were to have "the privilege of sending the vessel to a second safe port, by paying all expenses incurred in changing ports, and the time consumed in changing ports to count as lay days."

Under this contract, the vessel duly proceeded to Kingston, and was there partly loaded, and was then directed to proceed to Port Morant to complete her cargo. She accordingly proceeded to Port Morant, and was there filled up with bamboo. But neither the bamboo received in Kingston nor that received at Port Morant corresponded with the contract, the bundles being larger and longer than was required by the charter. It was all received under protest and notice that it was not received

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as complying with the contract. When the vessel was loaded at Port Morant, she attempted to go to sea, but as she was passing out of the port the breeze failed her, and she struck upon a reef and received considerable injury before she was got off. She then proceeded to New York and delivered her cargo, and brought this action to recover freight on four thousand bundles, at \$2.50 each, that being her alleged capacity for bundles of the size provided in the contract, and also for demurrage for twenty days used in loading and discharging and changing ports beyond the lay days given in the charter, and also for \$7,500 as the amount of the injury received by the vessel in coming out of Port Morant.

For libellants, *Benedict & Benedict*.

For respondents, *Beebe, Donohue & Cooke*.

BENEDICT, J. As it is not disputed that the bundles of bamboo which were furnished to the vessel were larger than the contract permitted, and as the evidence is clear and full that the vessel brought all that she could stow of bundles such as were furnished, the libellants are entitled to receive payment at the rate of \$2.50 for as many bundles as she could stow of the required size. They are also entitled, upon the evidence, to recover demurrage, at the rate of \$100 per day, for all days used exceeding the lay days given by the charter, including the time used in changing ports.

But they are not entitled to recover the amount claimed for damages sustained in coming out of Port Morant; and this, although it must be conceded that, upon the evidence, Port Morant cannot be held to be a safe port, within the meaning of the charter. The words, "second safe port," imply a port which this vessel could enter and depart from without legal restraint, and without incurring more than the ordinary

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perils of the seas. The evidence shows, that, by reason of reefs extending nearly across the narrow entrance of this port, a vessel of the size of the *Elizabeth Hamilton* must strike the reefs if, by chance, the breeze should fail her while passing in or out. On the present occasion she passed in in safety, but in coming out the breeze did fail, and she accordingly struck the reefs, and sustained the injury now sought to be recovered.

This accident, as appears from the evidence, was from no want of judgment or seamanship on the part of the vessel, but was inevitable under the circumstances, by reason of the narrowness and character of the channel. No tugs were to be had, and the only power by which this vessel could get out was that of the land breeze; while the peril of the port was such that no vessel of this size could get out without making her safety from the reefs dependent entirely upon the continuance of the breeze. Such a hazard the vessel was not bound to incur under the charter, and the master would have been justified in refusing to accept the designation of such a port as a port within the privilege given in the charter.

But he did not do so. On the contrary, he proceeded to Port Morant, entered the port, and there completed his cargo and then again departed, without objecting to the port, and without giving any notice that it was the intention to hold the charterers responsible for any injury that might arise from its unsafeness. This action of the master bound his owners.

The master is the navigator, presumed to know best the channel of the ports within the natural range of the adventure, and the capacities of his vessel; and he is the proper person to determine whether his vessel can or cannot enter any particular port.

In this case the second port was to be designated at Kingston, where the owners did not intend to be except in the person of the master; and they must have intended that the master should act for them in determin-

ing the question which would arise when the second port should be designated, and must be there decided.

If, then, the port named was deemed an unsafe port for his vessel, and so not within the privilege given by the charter, it was the duty of the master, as the sole representative of the owners, to have made known his objections at the time. Not having done so, he must be deemed to have waived the right to object, and, the condition having been waived, no action can now be maintained for the breach of it.

But it is said that the master was induced to accept Port Morant as within the terms of the contract by the representations of the charterers' agent that it was a safe port; and that his acceptance was a qualified acceptance, given upon representations which amounted to a warranty.

The evidence is, that when the agent first spoke of designating Port Morant, he did inform the master that it was a safe port, but it also appears that the master made inquiries elsewhere as to the character of the port, which was, moreover, fully described in the Coast Pilot; and I do not think it could be justly held, upon the evidence, that any thing said or done by the master was calculated to lead the charterers' agent to suppose that Port Morant was not accepted by the master upon his own judgment as a proper port, duly designated within the privilege given by the charter party, or to inform him that the charterer was to be held responsible in case the vessel received injury in using that port.

The claim for the injuries received in Port Morant is accordingly rejected, and a decree rendered in favor of the libellants for the other portions of their demand, with an order of reference to ascertain the amount, in accordance with this opinion.

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APRIL, 1868.

## THE BARK ACME.

## ADVANCES.—LIEN.—PRIORITIES.—FRAUDULENT NATIONALITY.

Where a libel was filed against a vessel to recover advances made in a foreign port, on the request of her master, for the purpose of paying off a bottomry bond, and on the return of the process no owner appeared for her, but a mortgagee appeared, and, on his consent, the vessel was sold under a *venditioni exponas*, and the proceeds paid into court, and thereupon the mortgagee filed a claim and answer, not only joining issue with the allegations of the libel, but setting up his claim as mortgagee, and praying that his claim be paid out of the proceeds, which were insufficient to satisfy both claims;

And where, on the proofs, it appeared that the vessel, though nominally a British vessel and owned by a British subject, was really the property of American citizens residing in New York, who thus sailed her under false colors, and with a fraudulent nationality, and, while they were so using her, agreed with the respondent for a loan of the security on their personal obligation and a mortgage on the vessel, to be executed by the fictitious owner, and the latter accordingly executed to the respondent the mortgage under which alone he claimed the proceeds:

*Held*, That the proceeding had been made one to effect the proper distribution of the proceeds of a vessel, already condemned and sold at the suit of the libellant, and it was, therefore, subject to the considerations which control Courts of Admiralty in the distribution of money in the registry.

That, before the English Admiralty, the claim of the mortgagee would be rejected as founded on a sham title, created in violation of law.

That, on principles of comity, it was the duty of this court to apply the same rule.

That the transaction in question was contrary to public policy, and was not to be upheld under our own laws.

That the claim of the mortgagee, therefore, must be rejected, and that the facts were sufficient to sustain the libellant's claim against the fund, and his claim, therefore, must be paid.

This was originally an ordinary suit *in rem*, brought to recover of the bark Acme the amount of certain advances made by the firm of M. A. Herrera & Co., of Havana. In the first instance, the libellants filed their libel against the vessel, upon which process was issued, under which the vessel was taken into custody by the marshal.

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Upon the return of the process, no owner appeared to defend, and default was entered against all persons, except George H. Millington, of Manchester, England, but residing in New York, who appeared by his proctor, and obtained time to file a claim and answer as mortgagee of the vessel. No stipulation for value was, however, given, but, on the contrary, by the consent of the mortgagee, upon the motion of the libellants, a *venditioni exponas* was then issued in the cause, directing the marshal to sell the vessel, and pay the proceeds into the registry, to abide the further order of the court. The vessel was accordingly sold, and thereupon Millington filed a claim, averring that he was entitled to the proceeds; and, on the same day, he also filed a pleading, designated as a claim and answer, in which he not only joined issue upon the averments of the libel of Herrera, but also set up his own claim to the proceeds as based upon an outstanding mortgage upon the vessel; insisting that by virtue of such mortgage he had a lien upon the vessel superior and prior to the claim of Herrera, and praying not only that the claim of Herrera be rejected, but also that his own claim be paid out of the proceeds of the vessel now in court.

The facts in relation to Millington's mortgage were shown to be as follows. The bark Acme was built in Baltimore, Md., in 1855. At some time thereafter she was transferred—whether nominally or not did not appear—to one John Patterson, described as “of Inverness, Scotland, but now residing in the city of Brooklyn, State of New York.” In January, 1866, she, by purchase, became the property of persons residing and doing business in New York, who were not British subjects, and who, in the absence of other proof, the court held must be presumed to be American citizens. These persons, in order to avoid the navigation laws, and to retain for the vessel the British flag, to which, as the property of American citizens, she was no longer legally entitled, caused the title of the

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vessel to be placed in the name of one Henry James Creighton, described as "of Halifax, Nova Scotia, but now residing in the city of New York," and who had, in fact, no interest in the vessel, nor any possession thereof; and thereafter, although in reality owned and possessed by American citizens, controlled by them alone, and used for their sole benefit, the vessel, up to her seizure by the marshal, sailed under false colors, with a fraudulent nationality. While so sailing, the present respondent agreed with the real American owners of the vessel to loan to them the sum of \$12,000 on the security of their personal obligation, and a mortgage upon the vessel, to be executed by the fictitious owner, and, accordingly, in accordance with the forms of the British laws, Creighton then, without interest in or possession of the vessel, executed a mortgage upon her to secure the amount so loaned by Millington, which mortgage was received by Millington with the knowledge that the mortgagor did not own the vessel, but simply held the title for the purpose of giving to her a false nationality. Millington never had taken any possession of the vessel.

The proceeds of the vessel were not sufficient for the payment of the libellants' claim and the respondent's mortgage in full.

For libellants, *C. Donohue, and Benedict & Benedict.*

For respondent, *C. M. Da Costa.*

BENEDICT, J. The mode of procedure here adopted has made this, in effect, the ordinary case of a controversy between two competing claimants of a fund in court. The position of the respondent before the court is not that of an ordinary claimant of a vessel, who prays no affirmative relief, and simply asks the release of his vessel from custody. Here the vessel has, by the consent of the respondent, been sold upon the demand of



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the libellants, by the order of the court, and by his claim and answer the respondent requires the court to determine at the same time the respective rights and priorities of these two competing claimants to the fund. I see no objections to this method of procedure, when consented to by a claimant. It gives to the claimant the advantage of protecting himself by the purchase of the vessel, and, at the same time, sheltering the proceeds, by means of the default entered in behalf of the libellants, from any other liens which may be outstanding; but, at the same time, it transforms the proceedings from an action against a vessel looking toward her condemnation and sale, to a proceeding to effect a proper distribution of the proceeds of a vessel already condemned and sold at the suit of the first libellant. As such, they are subject to the considerations which control Courts of Admiralty in the distribution of money in the registry. There is, then, before the court a fund insufficient to satisfy the two demands which are now presented, and the court is called upon to determine the validity and priority of each of these demands as against the other. On the part of the mortgagee, while it is not denied that the libellants, Herrera & Co., made the advances for which they sue, and that they were made to relieve the necessities of the vessel in a foreign port, it is contended that the evidence shows that the advance was made upon the personal credit of the owners exclusively, and that, accordingly, no lien was created upon the vessel; which being the case, the fund, it is insisted, should be distributed in satisfaction of the mortgagee's claim. On the other hand, the libellants, Herrera & Co., insist that the credit of the vessel was relied on when they made their advances, and that they then acquired a valid lien upon the vessel under the maritime law, which entitled them to payment out of the fund, or, if it be considered that upon the evidence no lien was created, which could have been enforced against the vessel herself, still, they insist that in a proceeding

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to distribute a fund in the registry, the court must regard equity, and award the fund to them, for the reason that their advances were in fact for the benefit of the mortgagee, having been made to pay off a bottomry bond, which, if not thus paid, would have absorbed the whole vessel to the exclusion of the mortgage. And lastly, it is contended that the claim of the respondent rests upon an illegal title, made under circumstances which require the court to disregard it, as founded upon a transaction prohibited by law and contrary to public policy. Of these various propositions I shall consider only the last. The transaction disclosed by the evidence, as it regards the title and character of this vessel, was a clear fraud upon the navigation laws of the nation whose flag was thus assumed. By the law of England, the use of the British flag and national character upon vessels owned by other than British subjects, is unlawful, and subjects the vessel to forfeiture. Were this case, then, before the English Admiralty, the claim of the mortgagee would be rejected as founded upon a sham title, created in violation of law; and the question is presented, whether it is not the duty of this court to apply the same rule. In determining this question, it should be remarked that it is raised in a Court of Admiralty, and Courts of Admiralty are in some sense international courts, charged with the duty of declaring the law applicable to ships and in force upon the sea, which, being the common highway of the nations, requires harmonious rules and laws recognized as such by all. These courts are often impelled to take notice of the rules and regulations which are applied in Admiralty Courts of other nations. They sometimes even enforce the decrees of such courts. They are courts before which the principles of comity may be invoked with peculiar propriety, and where those principles should be applied with increasing liberality, as year by year the nations are drawn closer to each other by the ties of commerce and of trade. And the nature of the trans-

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action in question, and the effect which such transactions, if upheld, must have upon the mode of use of that most peculiar species of property, the ships, seem to require of a Court of Admiralty in a case like this to accord effect to the laws of England, in contravention of which the title to this vessel was held. For this is not the case of the assumption of a neutral flag in time of war to cover property as against an enemy, nor yet is it a case of the violation of a revenue law of a foreign nation. The law of England violated in this case has no relation to the revenue, its only object is to prevent the privileges and protections, afforded to the property of British subjects in ships, from being claimed by vessels not entitled thereto. And it is a law which can well be noticed, and, on proper occasions, enforced by the courts of other nations, for the reason that the aid of those courts is necessary to its efficacy, inasmuch as the ship may never visit the ports of the nation whose flag she has fraudulently assumed. Indeed, being owned and controlled elsewhere, it is to be presumed that she will not visit ports where forfeiture awaits her.

Furthermore, the United States have an interest in enforcing this law as well as England, for it is of importance to all maritime powers that the national character borne by a ship should be her true character. And, the offence is one which may be perpetrated against every maritime power by citizens of every other such power, and in regard to which the United States may at any time be placed in a position to desire reciprocity of decision for their own protection.

Such being the character of the transaction in question, and the proceeding here being one in regard to a fund, brought into the registry by the consent of the respondent, and the other facts of the case being such that substantial justice, as between the only claimants of the fund, will thus be rather promoted than otherwise, I am of the opinion that it is the duty of this court, upon

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The Bark Acme.

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principles of comity, in this case to apply the rule which would be applied in the English Admiralty, and refuse to recognize a claim to the fund, based upon a sham title, created in fraud of the navigation laws of England, for the purpose of giving to this ship a false nationality.

Of this conclusion the respondent can the less complain, because his mortgage, upon which not only his claim upon the fund, but his standing in court, depends, is drawn in the form prescribed by the Merchants' Shipping Act of England. It contains no word of conveyance other than the word "mortgage," nor any power of possession or sale, but expressly refers to the Merchants' Shipping Act as the source of the rights intended to be conferred by it. It is a statutory mortgage, apparently dependent for its efficacy upon a statutory power of sale. The respondent, then, invoking the laws of England in support of his claim, cannot well object to the application of any portion of those laws to his demand.

But the transaction here disclosed, and upon which the claim of the respondent rests, may well be considered, in a case like the present, as contrary to public policy, and so not to be upheld under our own laws. If it be not by any statute made a crime against the United States to assume and use a false nationality for a ship owned by American citizens (and I cannot find that it is), still such an act is clearly contrary to the spirit and policy of the Registry and Navigation laws of the United States. These laws have for their object the encouragement of American navigation and American shipbuilding, to the exclusion of foreign navigation and foreign ownership. And they everywhere look to the disclosure by citizens of the United States, owning in ships, of their ownership therein. To permit an evasion of the duties thus imposed through the device of a nominal title held by a foreigner resident here, would afford plain encouragement to disregard the law. The transaction, moreover, is not without features of fraud upon the public. For

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The Bark Acme.

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the ship is a common carrier, supposed by the public to have and be entitled to the national character which she bears ; but, bearing a false flag, she may involve innocent shippers, passengers, or seamen, in difficult and complicated questions, which may be precipitated upon them at any time in foreign ports or at home ; as, for instance, in regard to the liability to search, the jurisdiction of the consul of the nation whose flag has been falsely assumed, the rights and remedies of the seamen, and the jurisdiction of our courts in relation thereto, the applicability of the limited liability acts, and acts for preventing collisions, and other similar questions. And lastly, by reason of the peculiarity of property in ships and the legal formalities and restrictions imposed upon its use by our laws, a fictitious title, like the one in question, makes necessary false reports by the master at the custom house, by means of which officers of the revenue may be misled. It has the effect to conceal property which the law intends should be disclosed, and may thus operate as a fraud against creditors. It requires false declarations from the nominal owner and others, as in the present case, where the mortgagor acknowledged himself indebted to the respondent in the considerable sum of \$12,000, when, in fact, he owed him nothing, and declared himself to be the owner of the vessel, when he had no possession or ownership thereof, nor any sort of interest therein, as both he and the mortgagor then knew. It is a sham, created to avoid disabilities imposed by law, which places all parties connected therewith in a false relation toward the Government, the community, and each other, and should, therefore, in a case like the present, be held to be against the policy of the law, and insufficient as a basis of a claim upon the fund, as against the other claimant thereof. Upon these considerations, and without expressing any opinion upon the other questions argued before me, I reject the claim of the mortgagee. There being, then, no other claim to the fund,

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The Canal-boat John Lowe.

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except that of the libellant, the conceded facts are sufficient to support it, and the fund will be distributed in satisfaction thereof, so far as it may be sufficient therefor.

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APRIL, 1868.

## THE CANAL-BOAT JOHN LOWE.

## CLAIM FOR REPAIRS.—STALE CLAIM.

Where repairs were furnished in April, 1866, at New Brunswick, N. J., to a canal-boat, whose owner resided at Albany, N. Y.; and no steps were taken to enforce a lien upon the boat for the repairs, until August, 1867, although the vessel was several times at New Brunswick in the intervening period; and where the then owner, after the repairs were made, had mortgaged the boat, and she was sold, under that mortgage, to a *bond fide* purchaser, who claimed her in the suit brought to enforce the material-man's lien:

*Held*, That the lien had been lost by the failure of the libellant to enforce it for so long a period.

BENEDICT, J. This action is brought by Lewis H. Hoagland, to enforce an alleged lien upon the canal-boat "John Lowe," for a bill of repairs furnished to that vessel at the port of New Brunswick, N. J., in April, 1866.

It is not disputed that the repairs were done upon the request of the owner who was then master, and that the vessel was a vessel foreign to the port where she was repaired—nor is it contended that they were not necessary. But it is contended, first, that the work was done upon the personal credit of the owner exclusively, and not upon the credit of the vessel, and consequently no lien was created; second, that if a lien did exist, it has been lost by laches.

It is unnecessary to determine the first of these defences, as I am of the opinion that the latter must prevail.

It appears that the vessel was an Erie canal boat,

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The Canal-boat John Lowe.

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enrolled at New York, and her owner resided at Albany, in this State. At the time of the repairs she was engaged in making a trip through the Raritan canal, and was at New Brunswick several times after incurring the debt in question. No steps were taken to enforce the lien during that season—nor during the winter—nor until August of the next season. In the spring of 1866, the vessel was mortgaged by her owner to one Griffin, who subsequently, and before the commencement of this action, sold her, under the mortgage, to the present claimant, who is a *bonâ fide* purchaser for value without notice of the existence of any such outstanding demand.

It also appears that the libellant saw the vessel once certainly in New Brunswick, after the time when the repairs were done, and not since; but it does not appear that any steps were taken by the libellant to find the vessel during the period between her last visit to New Brunswick and the bringing of his suit. When his suit was commenced, the vessel appears to have been found without difficulty, and there is no evidence in the case indicating any effort to keep her out of the way.

Upon such a state of facts, it must be presumed that with proper effort the vessel could have been found at any time, either at the place of her enrollment, or the residence of her owner, or upon the Erie canal, where she is proved to have been employed after her last visit to New Brunswick.

When the nearness of the latter port to the port of New York is considered, and taking into view the habits of these boats and the nature of their employment, I am of the opinion that, in the absence of special circumstances, and as against a *bonâ fide* purchaser, the allowing a season to end, a winter to pass, and a new season to begin, without any effort to find the vessel for the purpose of enforcing the lien, should be held to be a waiver of it.

A decree must accordingly be made dismissing the libel—but it will be without costs.

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The Steam Ferry-boat Baltic.

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## Southern District of New York.

MAY, 1868.

### THE STEAM FERRY-BOAT BALTIC.

**COLLISION IN EAST RIVER.—FOG.—SPEED.—UNLAWFUL ANCHORAGE.**

Where a brig lying at anchor in the East river, within the distance of sixty yards from a direct line between the landing places of one of the ferries, was run into by a ferry-boat in a fog in the early morning, the ferry-boat having previously made five trips on the ferry that morning, on which trips the light of the brig had been seen, and she had been avoided, and, on the trip in question, the ferry-boat, after starting from her slip, slowed to half speed, and ran on, looking for the brig, and, not seeing her, stopped her engine, and afterward started ahead again, and, as soon as she got way on her, shut off to half speed, and ran so till she sighted the brig at a distance of not over twenty yards, but, not being able to stop in less than thirty yards, was not then able to avoid a collision:

*Held*, That the ferry-boat was in fault in going at too great speed, and that such fault contributed to the collision.

That the brig was violating an ordinance of New York city in lying where she was, and that such violation was a fault contributing to the collision.

That, both vessels being in fault, the damages must be apportioned.

**BLATCHFORD, J.** This is a libel for a collision, filed by Baron de Livramento, the owner of the Brazilian brig *Palma*, against the steam ferry-boat *Baltic*. The collision happened on the morning of the 14th of December, 1863, a few minutes after a quarter past six o'clock. The brig was lying at anchor in the East river, near the ferry-boat's slip, at the foot of Atlantic street, in Brooklyn. The ferry-boat plied regularly from the foot of Whitehall street, New York, to her slip at Brooklyn. She had been running on the morning in question since five o'clock, having left Brooklyn at that hour. The trip from one side to the other usually occupied six or seven minutes. She left Brooklyn again at half past five



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The Steam Ferry-boat Baltic.

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o'clock, and again at six o'clock. She left New York at a quarter past five o'clock, at a quarter before six o'clock, and at a quarter past six o'clock. The collision happened on the last-named trip. She had, therefore, made five trips on that morning before the trip on which the collision happened. On each of those trips she had passed the brig in safety. At the time of the collision, the tide was flood, and the Palma was heading to the southward and westward. There was a very thick and heavy fog at the time, it having been foggy since the previous afternoon, and very thick since before five o'clock. The Palma had anchored where she was on the previous afternoon, and had not shifted her position at all from the time she anchored, except as she swung with the changes of the tide. The ferry-boat struck the Palma, the starboard bow of the ferry-boat coming in contact with the starboard quarter of the Palma, and causing considerable damage. The pilot of the ferry-boat knew that the Palma was anchored there, and had seen her there at anchor on the previous afternoon. On the morning in question he had passed, on his trips, sometimes ahead of her, and sometimes astern of her, as she lay in the tide, and had made her light. On the five previous trips the tide was ebb, and the Palma headed to the north. On the collision trip, the tide was flood, and the Palma headed the other way. The Palma had a light in her rigging during the five trips of the ferry-boat, on that morning, prior to the trip on which the collision took place. This light the ferry-boat had looked for and made, and was guided by, on those five trips. Whether the light on the Palma continued to burn on the trip when the ferry-boat struck her, is disputed on the evidence. The ferry-boat, having left New York on such trip, slowed her engine down to what is called half speed, by shutting off, soon after leaving her slip on the New York side, and kept blowing her steam whistle every few seconds. She was looking for the brig. Not seeing her,

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The Steam Ferry-boat Baltic.

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she stopped her engine, and afterward started ahead again, and, as soon as she got way on, shut off to half speed, and ran so till she sighted the brig, at a distance of not over twenty yards off. The engine of the ferry-boat was then stopped and reversed as quickly as possible, and her helm was starboarded, so as to throw her bow up the river with the flood tide. This was a proper manœuvre, and caused the blow to be a glancing one, and comparatively light. The evidence is, that the ferry-boat, while running shut off, could stop her headway entirely in thirty yards, and that, if she had sighted the brig at a greater distance off than thirty yards, she would not have hit her.

It is impossible not to hold, on these facts, that the ferry-boat was in fault in going at too great speed in the fog, and that such fault contributed to the collision. Although the brig may have been in fault in anchoring where she was, and in not showing a light at the time of the collision, still such fault of the brig, although it partly led to the collision, cannot excuse the fault of the ferry-boat in not running at a sufficiently moderate speed in the fog to avoid the brig. She knew the position of the brig, and, although the brig had been anchored there since the previous afternoon, no notice to the brig to move her position is proved, and the ferry-boat seems to have been content to leave her there and to take the risk of hitting her, although it had been foggy from soon after she anchored, the fog increasing to the time of the collision. Having taken that risk, one element of it was, that the light on the brig, which was exhibited on the five trips, might cease to burn on the sixth. This view proceeds on the assumption that the brig did not have a light. Whether she did or not, I do not deem it necessary to find, for I am satisfied, on the evidence, that the brig was lying in a forbidden place. She was violating the ordinance of the city of New York (*section 14, of article 2, of chapter 26, of the Revised Ordinances of 1859, page*

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The Steamer Western Metropolis.

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291), which provides, that no vessel shall lie at anchor in the East river within the distance of sixty yards from a direct line between the landing places of either of the public ferries across the river. This ordinance was binding on the brig, and her violation of it was a fault (*The Bedford*, 5 *Blatchf. C. C. R.*, 200; *The James Gray v. The John Fraser*, 21 *Howard*, 187 to 189). Such violation contributed to the collision.

This case is in all its material features substantially like the case of *The Bedford*. There must be a decree apportioning equally between the two vessels the damages caused to the libellant by the collision, such damages to be ascertained by a reference.

*G. A. Forster*, for the libellant.

*B. D. Silliman*, for the claimants.

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MAY, 1868.

### THE STEAMER WESTERN METROPOLIS.

#### COLLISION OFF NANTUCKET.—STEAMER PORTING IN IGNORANCE OF SCHOONER'S COURSE.—LOOKOUT.—SPEED.

Where a schooner, heading west-southwest on her starboard tack, running over from the Horseshoe shoal, near Nantucket, toward the Cross-Rip Light, was struck on her starboard side by a steamer which had come up, bound east, till near the schooner, the steamer's helm having been at once ported, when the schooner was seen ahead, and kept so till the collision occurred:

*Held*, That the steamer was in fault in porting, whether it was done wilfully, or in ignorance of the schooner's course, for, by that porting, she followed up the schooner and struck her.

That the evidence of the pilot of the steamer, that he saw the schooner from a quarter to a half a mile off, is more reliable than that of other witnesses who came out suddenly into the darkness, that she could not be seen so far off.

That, on the evidence, the night was light enough to have enabled the steamer to discover the schooner sooner than she did, if a good lookout had been kept, and, if it was not light enough, the steamer was running at too great speed.

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The Steamer Western Metropolis.

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That the schooner had a light set, and kept her course, and was not in fault; and that the steamer was liable for the collision.\*

BLATCHFORD, J. This is a libel for a collision, which occurred about four o'clock A. M., on the 17th of March, 1864, between the schooner *Triumph*, owned by John Low, Jr., which was bound from Gloucester, Massachusetts, to New York, with a cargo of fish, and the steamer *Western Metropolis*, a side-wheel steamer, bound from New York to Boston. The collision took place a short distance east by south, or east-southeast, from the Cross-Rip lightship, near the Nantucket shoals. The schooner was, at the time, close-hauled on her starboard tack, for the purpose of beating through the channel to the northward of the lightship, the wind being northwest by west, and the schooner heading west-southwest, which was one point to the leeward of what would have been her proper course at that place with a fair wind. The steamer struck the schooner on the starboard side of the schooner, and the schooner very soon sank and was totally lost. The crew of the schooner consisted of her captain, a mate, a steward, and three seamen. The captain was at the wheel. Two of the seamen were killed, or drowned by the collision. The captain, the mate, and the remaining seaman, have been examined as witnesses.

The person who had charge of the steamer, in the capacity of pilot, at the time, and who was at her wheel in the pilot-house, giving orders as to steering her, was not a licensed pilot, and was hired as pilot for the steamer for that particular trip. He had never been permanently employed on a steamer as a pilot, and it does not appear that he had ever before piloted a vessel through the passage where the collision took place, or ever before been through that passage. He says, that, at the time of the collision, it was dark and hazy; that the man on the

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\* This decision was affirmed by the Circuit Court, on appeal, in April, 1870.

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The Steamer Western Metropolis.

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forecastle reported a sail right ahead ; that he then told the quarter-master, who was with him at the wheel, to port the wheel, and rang the bells to stop and back the engine, and did this as quickly as it could be done ; that he saw the schooner one and a half or two minutes before she was struck, and that the schooner was not more than from a quarter to a half of a mile off when he first saw her ; that he used his night glass, and with it got a full view of the schooner ; that, as soon as he heard the report of the lookout, he rang the bells, and put the glass to his eye ; and that he saw the schooner with the naked eye, before he used the glass.

The master of the steamer says, that the night was dark and hazy ; that he was in his berth in the pilot-house, awake, when he heard the report of the lookout, "sail on the port bow ;" that the pilot gave orders to port the helm instantly, and then rang the bells to stop and back ; that he, the master, jumped to the wheel, and found it hard-a-port ; and that the collision took place about the time the last bell was struck.

The quarter-master, who was at the wheel with the acting-pilot, says, that the night was dark, thick, and hazy at the time ; that the lookout on the fore-castle cried out, "a sail ahead ;" and that the order was then given, as quickly as possible, to port and to stop and back.

A hand, who was on the bridge, says, that the report was "a sail ;" that the night was dark and cloudy ; that, when the sail was reported, the schooner was the steamer's length off ; and that the wheel of the steamer was ported, and her engine stopped and backed.

The lookout on the fore-castle, who reported the sail, says, that the night was rather foggy, and there was quite a vapor rising from the water ; that, when he caught sight of the vessel, it was too thick for him to tell what sort of a vessel she was ; and that, just before the steamer struck her, he saw that her boom was over to her port side.

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The Steamer Western Metropolis.

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It is manifest, on this evidence, that the steamer's helm was ported in entire ignorance on the part of those on board of the steamer as to which way the schooner was heading, or even what sort of a vessel she was. This was a fault on the part of the steamer, and it was a fault which led to the collision, for, it is apparent, that, if the steamer had not ported, she would have gone under the stern of the schooner. The schooner kept on her course, close-hauled, heading west-southwest, and the steamer, by porting, and keeping her helm hard-a-port, persistently followed up the schooner, and ran into her and sank her. Whether this was done by the steamer wilfully or ignorantly makes no difference. If she knew how the schooner was heading, and then ported, the act was wilful, and was a fault, as she was bound to keep out of the way of the schooner. If she did not know how the schooner was heading, and ported in ignorance, the act was equally faulty. It grew out of the incompetence and mismanagement of the man at the wheel.

The story as to the porting is fully confirmed by the testimony of those on board of the schooner. They saw the steamer's lights some distance off, bearing west half south, just after the schooner had changed to the tack she was on at the collision. They first saw her two white lights, one high up and one on the bow, the two being in range. Then, as the schooner went on heading west-southwest, the steamer's green light came into view, then her red light came into view, so that both the green and the red were visible, and then the green disappeared and the red alone was visible, and this continued so till the collision. This shows that the steamer was swinging to her own starboard on a port helm, and swinging toward the schooner as the schooner went on close-hauled. The testimony from both vessels entirely concurs, and shows that this porting of the steamer's helm caused the collision. This is sufficient to condemn the steamer in damages (*The Louisiana*, *ante*, p. 371).

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The Steamer Western Metropolis.

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The only defence set up in the answer is, that the schooner changed her course, and that, as soon as the schooner could, with all proper caution, be seen from the steamer, the steamer was stopped and backed, and every exertion made to avoid the collision. It is proved that the schooner did not change her course.

An effort was made on the part of the claimants to show that the night was so dark and thick and hazy that the schooner could not have been seen at any greater distance than she was seen. There are several answers to this position : (1.) She was, in fact, seen at a distance far enough off to have avoided her, if the steamer's helm had not been wrongfully put to port; (2.) The night was not so dark or hazy as to prevent the schooner being seen at a greater distance, if a proper lookout had been kept on the steamer; (3.) If the night was as thick and hazy as claimed, the steamer was running too fast.

I regard the evidence of the passenger, the engineer, and the storekeeper, as to the thickness of the night, as of very little weight. They came out suddenly into the darkness, under circumstances which made it impossible for them to judge as to how far a vessel could be seen. The evidence of the pilot, as to how far off he did in fact see the vessel, is much more reliable. He had been out in the night, and his eyes were gauged to its condition. He does not pretend, nor does any one on the steamer, that the collision would have happened if the steamer had not ported, after seeing the schooner, in ignorance of her course.

That the night was not a foggy one, is shown, also, negatively, by the fact that the steamer was not using her steam-whistle. No witness pretends that she was, except the lookout on the steamer, who, on his examination in open court, after the case had closed, he not having heard any of the testimony of the other witnesses, or any part of the trial, fabricated the story that the steamer kept blowing her fog whistle because the fog was so thick.

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In the Matter of Darius Tallman, a Bankrupt.

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I am also satisfied, from the evidence, that the schooner had a light set in her starboard fore-rigging, and properly burning at the time of the collision.

There must be a decree for the libellants, with a reference to a commissioner to ascertain the damages.

*Benedict and Benedict*, for the libellant.

*W. R. Beebe and C. Donohue*, for the claimants.

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MAY, 1868.

### IN THE MATTER OF DARIUS TALLMAN, A BANKRUPT.

#### TIME TO FILE SPECIFICATIONS OF OBJECTION.

Where creditors were required to show cause on a certain day, why a bankrupt should not be discharged, and on that day creditors appeared, and the proceedings on the order were adjourned till a subsequent day:

*Held*, That the ten days, within which specifications of objections to the discharge were to be filed, dated from the adjourned day.

IN this case, an order was made, requiring the creditors to show cause why the bankrupt should not be discharged from his debts, returnable on April 20th, 1868. On that day, an opposing creditor duly entered his appearance, and the proceedings on the order to show cause were adjourned to May 2d. On that day, the creditor presented specifications of objections to the discharge, which the Register refused to receive, on the ground that, by General Order No. 24, they should have been filed within ten days from the return day of the order to show cause. On request of the creditor, he certified the question to the court.

BLATCHFORD, J. The Register states that the pro-



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*The Brig Antelope.*

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ceedings upon the order to show cause, were, on the 20th day of April, 1868, adjourned to the 2d day of May, 1868. This being so, the case stood as if the 2d day of May was the day originally fixed for the creditor to show cause; and any creditor, entitled to show cause, could do so on the 2d day of May, and could file his specifications within ten days after the 2d day of May. Therefore, the creditor, in this case, was entitled to file his specifications on the 2d day of May, and the Register ought to have received them. By the terms of the adjournment, the Register made the 2d day of May, within General Order No. 24, the day when the creditors were required to show cause. If there had been no adjournment, the case would have been different.

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MAY, 1868.

THE BRIG ANTELOPE.

BUILDING CONTRACT.—LIEN UNDER STATE LAW.—PORT.

Where articles are furnished towards the building of a vessel, no lien for their value is given by the general maritime law.

Where a vessel was built at Newburgh, New York, in 1855, and articles were furnished by the libellant there for such building, and the vessel left Newburgh and went to New York city, and the libellant then filed his libel, in 1855, to recover the value of the articles:

*Held*, That he had no lien under the lien law then in force in the State, because he had not filed specifications of his lien within twelve days after the vessel left the port of Newburgh, as was required by such lien law.

That he had no lien otherwise, and the libel must be dismissed.

BLATCHFORD, J. This is a libel, which avers, that, sometime in September, 1855, there being then a brig or vessel, since called the Antelope, building at Newburgh, in the State of New York, her owner or owners, or his or their agent employed in building the same, applied to the libellant, David J. Taff, to furnish a set of spars and a

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The Brig Antelope.

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foreyard for the vessel ; that the libellant, on such order, furnished to the brig one set of spars and a foreyard ; that the value of the set of spars was \$385, and the value of the foreyard \$30 ; that the articles were duly delivered, and were used in building the vessel ; that the value thereof was, by the maritime law and the law of the State of New York, a lien on the vessel ; that the articles have not been paid for ; that the vessel is at the city of New York ; that she left Newburgh, where she was built, for the city of New York, about seven days prior to October 4th, 1855 ; and that she has remained at New York ever since, and has never been without the State of New York. The libel was filed October 4th, 1855.

The answer sets up, as a defence, that the spars alleged to have been furnished to the brig were furnished to one Marvell, and not to the vessel, and that, if any lien ever existed, it was lost by the departure of the vessel from the port where she lay at the time of the alleged furnishing of the spars.

This defence is made out, as respects the loss of any lien which the libellant ever had. He had no lien by the general maritime law, for the articles furnished by him towards building the vessel, which this court can enforce in Admiralty (*People's Ferry Co. v. Beers*, 20 *Howard*, 393 ; *Roach v. Chapman*, 22 *Howard*, 129). Therefore, any lien which he had was one given by the law of New York. By that law (2 *R. S.* 493, § 1, *as amended by chap. 110 of the laws of 1855, passed March 29th, 1855*), whenever a debt amounting to fifty dollars or upwards is contracted by the master, owner, or his agent, builder, or consignee, of any ship or vessel within the State, on account of any materials or articles furnished in this State, for or towards the building, fitting, furnishing, or equipping such ship or vessel, such debt is made a lien upon such ship or vessel, her tackle, apparel, and furniture, and is preferred to all other liens thereon except mariners' wages. It is further provided (§ 2, *as amended by the same Act of 1855*),

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Stokely v. Smith.

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that, in all cases, the lien shall cease immediately after the vessel shall have left the port at which she was when the debt was contracted, unless the person having the lien shall, within ten days after such departure, cause to be drawn up specifications of his lien, the correctness of which shall be verified by oath and filed in the County Clerk's office of the county in which the lien shall be created. In this case, the libel and the testimony show that the vessel was built at Newburgh, that she was at Newburgh when the debt was contracted, that the articles furnished by the libellant were furnished to her at Newburgh, and were used in building her at Newburgh, and that she had left Newburgh, and had arrived at New York. The lien, therefore, if any there was, ceased immediately after the vessel left Newburgh, unless the libellant filed the specifications prescribed within ten days after the departure of the vessel from Newburgh. The libel avers no such filing. It is for the libellant to aver and prove such filing. No evidence of any such filing was given. The answer takes the objection clearly, and the libel must be dismissed, with costs.

*A. F. Smith*, for the libellant.

*C. Donohue*, for the claimant.

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MAY, 1868.

BENJAMIN STOKELY *et al.* v. HASKELL G.  
SMITH.

CHARTER PARTY.—DILIGENCE.—BLOCKADED PORT.—DEVIATION.

Where a vessel was chartered in New York for a voyage to Port au Platte, St. Domingo, or, in case of that port being blockaded, to another open port in the same island, or a market, and back to New York, the vessel to use all diligence

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Stokely v. Smith.

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in port and at sea, and the charterer, in answer to a libel to recover the charter money, set up various delays by the vessel, one being a deviation to Turks Island, for the purpose of inquiring whether Port au Platte was blockaded:

*Held*, That the vessel would have been liable to seizure as a prize, if she had gone direct to Port au Platte for the purpose of inquiring whether the blockade of that port was raised.

That, as there was no restriction in the charter as to where the master should make inquiry, and as Turks Island was shown to be a proper place to make such inquiry, the vessel was not chargeable with any loss occasioned by her going to Turks Island for that purpose, only the necessary time having been consumed.

That evidence of instructions from the charterer to the master of the vessel, in reference to going to Turks Island, could not affect the rights of the parties in regard to matters that were covered by the charter.

That, for delay occasioned by a mistake of the master in passing by a port, the owners of the vessel were liable.

This was a libel to recover the sum of \$1,083.85, as a balance, due on a written charter party, made at New York, between the master of the schooner *Indus*, owned by Benjamin Stokely and others, the libellants, and the respondent, Haskell G. Smith, on the 20th of May, 1858. The charter party chartered the vessel to the respondent, for a voyage "from the port of New York to Port au Platte, St. Domingo, or, in case of that port being blockaded, to another open port on same island, or a market, and back to New York, with a supercargo on board free, not to go to Port au Prince except in case of stress of weather, on the terms following, viz." One of those terms was, "and use all diligence in ports and at sea." The charter money was stipulated to be "six hundred dollars per month, payable in United States currency, upon completion of charter."

The libel set forth, that the vessel entered on the fulfilment of the charter on the 20th of May, 1858, and proceeded to Port au Platte, and thence to Porto Rico and back to New York, and was thus employed for two months and ten days, and that the charter money payable was \$1,400, of which \$1,083.85 remained unpaid, and had been demanded from the respondent, and payment refused.

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Stekely v. Smith.

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The defences set up in the answer were, that the vessel did not use all diligence in ports and at sea ; that she lost three days, through the wilful misfeasance of the master, in not sailing from New York as soon as she should have sailed by three days ; that she lost two days more by stopping at Turks Island, instead of going direct to Port au Platte ; that she lost two days more by unnecessarily going beyond the port of San Juan, in Porto Rico, through the incompetency of the master in navigating the vessel, and being obliged to return over her track ; that one bale of tobacco in the cargo was negligently damaged by the master and crew, to the amount of five dollars ; that, if the vessel had sailed from New York when she ought to have done so, she would have arrived at Port au Platte within ten days, or thereabouts, after the blockade of that port was raised, and five days in advance of any other vessel laden with provisions, and would have sold her cargo at high prices, but that, in consequence of the delays set forth, other vessels laden with provisions arrived before the cargo of the *Indus* could be sold, and prices declined, and the respondent suffered a loss of \$2,000 ; that the libellants were entitled in no event to recover for more than two months and three days' time ; that there had been paid, on account of the charter party, \$375.15, and \$5 for damage to the tobacco ; and that there remained due no more than \$878.85.

For libellants, *W. R. Beebe*.

For respondent, *A. W. Griswold*.

BLATCHFORD, J. I think that the master of the *Indus* is, according to the weight of the evidence, not responsible for the three days' delay in sailing from New York, but that that delay was caused by the storm which was setting in just as the vessel was ready to sail, and that the master was justified in not putting to sea before he did.

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Stokely v. Smith.

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As to the deviation to Turks Island, the evidence shows, that it was for the purpose of inquiring whether the blockade of Port au Platte was raised ; that no more time than was necessary was consumed in making that inquiry ; that Turks Island was the most proper and convenient place for making the inquiry ; and that, before the vessel left New York, it was known that Port au Platte was blockaded, but it was not known whether or not the blockade was raised. A great deal of irrelevant testimony has been put in by deposition, on the part of the respondent, to show conversations by him and his agents with the master of the Indus, and instructions by him to the master, in reference to his going to Turks Island. But the rights of the parties are fixed by, and depend upon, the written charter party, and cannot be varied or affected by any such conversations or instructions, in regard to matters that are covered by the charter party. The charter party, on its face, contemplates a blockade of Port au Platte, and the evidence is, that it was blockaded, and that such blockade was known at New York before the vessel sailed from New York. The substance of the charter party is, that the vessel shall go to Port au Platte, if Port au Platte is not blockaded, and that she shall not go to any other port, as her port of destination, if Port au Platte is not blockaded, but that, if Port au Platte is blockaded, she shall go to some other port, as her port of destination. There is no restriction against her going to Turks Island, or any other place, to inquire as to the blockade, the only restriction as to going to any particular place being a restriction against going to Port au Prince, except in case of stress of weather. Under the charter party, therefore, the vessel had the right to exercise the privilege of inquiring at a proper port in regard to the blockade of Port au Platte. If, with a knowledge of the blockade of Port au Platte, the vessel had deliberately contracted to go there, she would undoubtedly have been bound to go there directly. But

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she did not so contract. Her contract was the very reverse, and was a contract to go there only in case the port was not blockaded. If, under this charter party, the vessel had gone, with this charter party on board, and a clearance for Port au Platte, directly to Port au Platte, and the blockade had been still in force, and she and her cargo had been captured, the plea that she had gone there to make inquiry as to the raising of the blockade, with no intention of entering if she found the port still blockaded, would not have availed her, and the respondent could have held her liable to him for his cargo, on the ground that, under the charter party, she was not authorized to go there if the port was blockaded. It is well settled that, where knowledge of a blockade exists at the commencement of the voyage of a vessel, she cannot lawfully approach a blockaded port, even for the *bond fide* purpose of inquiring as to the continuance of the blockade, and, if she does, she is liable to capture (*The Delta*, *Blatchf. Prize Cases*, 133; *The Cheshire*, *Id.*, 151, 643; *The Empress*, *Id.*, 175, 659). And, where the owner of the cargo knows of the blockade when the vessel sails, he loses his cargo, as lawful prize, in case of capture because of any fault committed by the vessel (*The Sunbeam*, *Id.*, 656). The master of the *Indus*, therefore, in the discharge of his proper duty to the vessel and to the respondent, was bound not to approach Port au Platte, for any purpose, under the facts existing in this case, until advised of the raising of the blockade; and his going to Turks Island, to make inquiry on that subject, was proper. The obligations of the parties to the charter party were reciprocal. The respondent could have held the vessel liable for the loss of his cargo if she had gone directly to Port au Platte and found it blockaded, and had been captured with her cargo, and had been condemned for attempting to violate the blockade. The respondent is, therefore, not entitled to any allowance for any loss of time by the deviation to Turks Island.

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In the Matter of George S. Mawson, a Bankrupt.

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A clear negligent loss of two days' time is shown, resulting from the mistake of the master, in passing by the port of St. Juan. For this loss the respondent is entitled to be allowed.

As there was no delay, for which the vessel is responsible, in her voyage to Port au Platte, the question raised, as to the liability of the vessel for the loss by the respondent of prospective profits on the cargo, does not come up for decision.

If the parties do not agree, there must be a reference to a commissioner, to compute the amount due to the libellants on the basis of this decision, the respondent to be allowed also for damage to the tobacco, if proved, and, for the amount so to be computed, with costs, the libellants will be entitled to a decree.

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MAY, 1868.

### IN THE MATTER OF GEORGE S. MAWSON, A BANKRUPT.

#### PROCURING CREDITORS' ASSENT TO DISCHARGE.—AGREEMENT TO PAY COUNSEL FEES.—BURDEN OF PROOF.

Where creditors opposed the discharge of a bankrupt, on the ground that he had procured the assent of certain creditors to his discharge by a pecuniary obligation, and the evidence showed that he had paid to the counsel for those creditors, their fees, for services rendered in the matter, amounting to \$20, but it also appeared that those creditors had announced that they would not oppose the discharge, before any thing whatever was said about his paying their counsel fees, and that such payment was not made a condition of their withdrawing further opposition:

*Held*, That the burden of proof was upon the opposing creditors, and the proof did not sustain the specification.

Two creditors opposed the discharge of the bankrupt in this case, on like specifications, which were, in substance, that the bankrupt had influenced the action of



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In the Matter of George S. Mawson, a Bankrupt.

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Arnold, Nusbaum, and Nordlinger, creditors of his, by procuring their assent to his discharge, since the filing of his petition, by a pecuniary consideration and obligation.\*

*F. C. Nye*, for the bankrupt.

*E. James* and *J. S. Ritterband*, for the creditors.

BLATCHFORD, J. I do not think that the evidence sustains this specification, or that the bankrupt has, either in letter or in spirit, violated any of the provisions of the Bankruptcy Act, or been guilty of any thing which is made a ground, by the 29th section of the Act, for withholding his discharge. The testimony given by the bankrupt, on the 23d of January, 1868, on his direct examination, unexplained, seemed to support the averment, that he had influenced the action of the creditors named by a pecuniary consideration, by procuring them to agree not to further oppose his discharge, if he would pay their counsel the amount of his charge, already then incurred, for services in the matter, and which amount the bankrupt subsequently paid, it being twenty dollars. But on his cross-examination, on the 13th of March, 1868, the bankrupt explained the whole matter satisfactorily; and his testimony shows, that the announcement by the creditors to him, that they would not oppose his discharge, was made before any thing was said between them and him as to paying their counsel, and at a prior interview, and was not induced by any promise on his part to pay the counsel, and was entirely independent of any such promise, and it does not appear that the suggestion of the creditors to him, at a subsequent interview, that it was right and proper that he should pay their counsel, was coupled with any intimation to him

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\* See *ante*, p. 332.

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In the Matter of Morris Kyler, a Bankrupt.

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that his agreement to pay the counsel must be a condition of, or a consideration for, or a precedent obligation to, their agreement not to oppose his discharge. It is not pretended that any thing was paid, or agreed to be paid, by the bankrupt, to, or for the benefit of, these creditors, except the twenty dollars. The affirmative is on the opposing creditors to support the allegation of the specification. It was open to them to do so by the testimony of that member of the firm, alleged to have been influenced in its action by the pecuniary consideration, with whom the transaction took place. They have not adduced such testimony, and they have failed to sustain the allegation. I see nothing in the evidence to impeach the honesty and fair dealing of the bankrupt in all respects, and a discharge will be granted to him.

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MAY, 1868.

IN THE MATTER OF MORRIS KYLER, A BANK-  
RUPT.

EXAMINATION OF NON-RESIDENT CREDITOR.—WITNESS' FEES.

Where a creditor, who resided in Boston, had proved his debt in the proceedings, and an order was made that he appear before the Register and be examined touching his debt, and a motion was made to attach him for not appearing in obedience to the order:

*Held*, That the creditor, having proved his debt, was subject to the jurisdiction of the court, without regard to his place of residence.

That, in case of his disobedience, the court could strike out his claim.

That he was not entitled to witness' fees for attendance under the order in question.

That, if he could not personally attend, to be examined in this district, without hardship, the court would provide for his being examined before a Register in the district of his residence.

In this case, on petition of the assignee, stating that James Houghton, Jr., had made proof of debt herein,

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In the Matter of Morris Kyler, a Bankrupt.

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according to Form 22 of the General Orders in Bankruptcy, and that the assignee had reason to believe that the debt so proved was founded in illegality, and was not entitled to be proved, or to participate in any dividend herein, the court made an order, pursuant to section 22 of the Bankruptcy Act, referring the matter to the Register in charge, and requiring the creditor to appear before the Register and be examined touching his alleged debt. Service of the order was made, but said Houghton did not appear before the Register. Thereupon, counsel for the assignee moved the court for an order rejecting and disallowing the debt, and also requiring the alleged creditor to show cause why he should not be punished for contempt, in not appearing and submitting to examination, as required by the order of the court.

It was objected, by counsel for the creditor, that he was not bound to attend before the Register, first, because he resided in Boston, and out of the district, and was, therefore, not subject to the jurisdiction of the court; and, second, because he could not be compelled to attend until his fees as a witness were first paid, which, it was alleged, had not been done.

For the assignee, *Cotterill Brothers*.

For the creditor, *A. L. Sanger*.

BLATCHFORD, J. I hold, first, that this creditor, having proved his debt in the proceedings, became subject to the jurisdiction of the court, without regard to his place of residence, and was bound to obey all the orders of the court touching his alleged debt; second, that the court can, in case of his disobedience of its orders, deprive him of all the benefits of the Bankruptcy Act, given to creditors, and can reject and expunge his claims; third, that he is not entitled to witness' fees

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The Bark Emilie—The Pilot Boat Abraham Leggett.

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for attendance, in analogy to the fact that a bankrupt, ordered to be examined under section 26, is not entitled to fees, as a witness—the language of section 22, in regard to the examination of the bankrupt and of a creditor, and the language of section 26, in regard to the examination of the bankrupt, being substantially identical; and, fourth, that, in case it shall be made to appear that any creditor, whose debt is contested, can not personally attend to be examined in the district where the proceedings are pending, without hardship to him, owing to the distance of his residence, or other similar reason, the court will provide, by order, for the taking of his examination before a Register of the district in which he resides.

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MAY, 1868.

THE BARK EMILIE—THE PILOT BOAT ABRAHAM LEGGETT.

COLLISION IN NEW YORK HARBOR.—VESSEL AT ANCHOR.—VESSEL IN TOW.

Where a pilot boat was lying at anchor, off the Quarantine, with her sails up to dry, and a bark coming in from sea in tow of a tug was brought close to her, when the tug was stopped, but the bark kept on with the tide, and a collision occurred between her and the pilot boat:

*Held*, That the collision was occasioned by the bark being brought too close to the pilot boat.

That the pilot boat did not raise her anchor, and the effort on board of her, by porting her helm and getting up her jib, to let the bark go ahead of her, was caused by the approach of the bark, and was proper, under the circumstances.

BLATCHFORD, J. These are cross libels for a collision which took place about three o'clock P.M., on the 4th of September, 1866, near the Quarantine Ground, off Staten Island, in the harbor of New York, between the schooner

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The Bark Emilie—The Pilot Boat Abraham Leggett.

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pilot boat Abraham Leggett, and the bark Emilie, a Bremen vessel. The bark was coming in from sea in tow of a tug, towed behind the tug, by a hawser, and in charge of a pilot, who was on board of the bark, and who had the direction of the movements of both the bark and the tug. The tide was flood, and the wind about northwest, blowing pretty fresh. The course of the channel, at the place of collision, was north and south. The bark had no sails set. The stem and bowsprit of the pilot boat came in contact with the port side of the bark, the bowsprit entering the bark, and both vessels were considerably damaged. The case set up on the part of the pilot boat is, that she was lying at anchor in a proper place, with her sails up to dry, and in plain sight of the tug and the bark as they approached, and that the bark attempted to pass too close to the pilot boat, and in consequence ran into her.

The case set up on the part of the bark is, that, as she and her tug neared the Quarantine Station, the tug was stopped and the bark brought nearly to a stand-still, for the purpose of waiting for the health officer to come on board; that, while she was thus so waiting, the pilot boat was lying with her sails up, apparently at anchor, and to the westward of the bark, and between her and the shore of Staten Island; that the pilot boat heaved at her chain, got under way, held her jib to port, and proceeded under full sail for the bark, heading for her foremast; that the helm of the bark was at once put hard to port, but that movement, owing to her want of steerage way, had no apparent effect on her; that the bark hailed to the pilot boat to let her jib run and put her helm hard-a-starboard, which would have avoided the collision, but the hail was not complied with, and the helm of the pilot boat was kept to port, and she came head on into the bark.

I am satisfied, on the evidence, that this collision happened solely through the fault of the bark. It is

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The Bark *Em'lie*—The Pilot Boat *Abraham Leggett*.

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shown by the evidence of the man at her wheel, that her helm was put to port before the collision, and that her head fell off thereby a point and a half, that is, from north to north by east half east. Although her headway may have been stopped, so far as any traction of her by the tug was concerned, she was in the tide, and drifting with the tide in a direction toward the pilot boat, and the effect of putting the helm of the bark to port was to throw her head to the starboard and her hull more athwart the tide. The pilot boat was at anchor, with her sails up to dry, as could plainly be seen from the bark, and it is not claimed that the pilot boat changed her position, or got under way, until the bark had come up quite near to her. I am not at all satisfied that the pilot boat hoisted her anchor at all. She was waiting for the pilots who belonged on board of her to come down from the city, and, until they arrived, there was no occasion for her to get under way, and it is improbable that she would do so. They had not arrived at the time of the collision. Whatever the pilot boat did in the way of hoisting her jib and getting on any headway, was a consequence of the peril in which the bark put her by coming too close to her, and occurred when a collision was imminent. With the wind as it was, and the bark coming as she was with the flood tide, the manœuvre of the pilot boat to avoid the danger, namely, porting her helm, with a view to letting her head fall off from the wind, so that she could go under the stern of the bark, was a proper one, and would, under ordinary circumstances, have been effective. It was thwarted by the fact that her anchor held her head up to the wind. The fact of her putting up her jib, or getting on whatever headway she got, or porting her helm, cannot be imputed to her as a fault tending to cause a collision. She was put into the peril by the fault of the bark in coming so close as, by stopping the tug, to drift with the tide, so as to make a collision probable.

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In the Matter of Samuel R. Van Campen, on Habeas Corpus.

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In the suit against the bark, there must be a reference to a commissioner to ascertain the damages caused to the pilot boat by the collision, and a decree against the bark for the amount, with costs. The libel against the pilot boat is dismissed, with costs.

*Beebe, Dean & Donohue*, for the pilot boat.

*W. Q. Morton and J. K. Hill*, for the bark.

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MAY, 1868.

## IN THE MATTER OF SAMUEL R. VAN CAMPEN, ON HABEAS CORPUS.

### HABEAS CORPUS AND CERTIORARI.—BANKING ACT.—EMBEZZLEMENT.— MAKING FALSE ENTRIES.—EVIDENCE.

Where a party was charged, before a United States Commissioner, with embezzlement of the funds of a national bank, and with having made false entries in its books, and, an examination having been had, was held for trial, and the proceedings were brought before the court for review, by *habeas corpus* and *certiorari*:

*Held*, That the court, on such review, will examine the evidence before the commissioner, and will do what he ought to have done.

That evidence showing probable cause to believe that the accused is guilty, is sufficient to warrant his being committed for trial.

That evidence of the actual existence of a certain national bank, and of acts done by the accused as president thereof, is sufficient evidence, on such an examination, of the legal incorporation of the bank, and of the connection of the accused with it.

That the making of false entries by a clerk in the bank, by direction of the accused, constitutes the accused a principal in the offence of making false entries.

That an intent to defraud the bank is to be inferred from the fact of embezzlement.

That where the president of a national bank, charged, as trustee, with the administration of the funds of the bank in his hands, converts them to his own use, he embezzles and abstracts them, within the fifty-fifth section of the Act of June 3d, 1864 (13 *U. S. Stats. at Large*, 116), and the Acts amendatory thereof, unless he shows authority for so doing.

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*In the Matter of Samuel R. Van Campen, on Habeas Corpus.*

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**BLATCHFORD, J.** The prisoner was arrested in this district, on a warrant issued by the marshal of this district, on the 30th of April, 1868, by Commissioner Betts, a commissioner of the Circuit Court for this district, on a complaint made on oath before him, charging the prisoner with having, at Elmira, in the Northern District of New York, at various times specified in the warrant, during the year 1867, and while president of the First National Bank of Elmira, "an association and body corporate, created and organized under and by virtue of the Act of Congress, entitled 'An Act to provide a national currency, secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof,' approved February 25th, 1863, and the Acts amendatory thereof," embezzled, abstracted, and willfully misapplied moneys, funds, and credits of the association, to the amount of \$36,000, the property of the association, and a certain draft for \$7,000, the property of the association, and, with intent to defraud the association, and to deceive the officers and agents appointed to examine its affairs, and especially the bank examiner of the United States, made divers false entries in the books of the association, and in its reports and statements, which false entries are set forth particularly in the complaint. The prisoner was brought before the commissioner, and an examination of witnesses on the part of the United States, in support of the charge, took place on the 8th and 11th of May. The prisoner appeared by counsel, who cross-examined the witnesses on the part of the United States; but no witnesses were examined, or testimony put in, on the part of the prisoner. On the 12th of May, after the case had been summed up before the commissioner, by the counsel on both sides, he committed the prisoner to the custody of the marshal for this district, for trial in the Northern District of New York. At this stage of the proceedings, a petition was presented to this court by the prisoner,



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In the Matter of Samuel R. Van Campen, on Habeas Corpus.

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praying for a writ of *habeas corpus* to the marshal, and a writ of *certiorari* to the commissioner, in order that a review might be had, by this court, of the ground on which the prisoner was committed. The writs were issued on the 12th of May, and under them the prisoner has been brought before this court, and the proceedings and evidence before the commissioner have been returned to this court, and the case has been fully argued on an application by the prisoner to be discharged from custody.

The particular offences in regard to which testimony was taken before the commissioner, are made such by the fifty-fifth section of the Act of June 3d, 1864 (13 *U. S. Stat. at Large*, 116). That section provides, that "every president, director, cashier, teller, clerk, or agent of any association, who shall embezzle, abstract, or willfully misapply any of the moneys, funds, or credits of the association, \* \* \* \* or shall make any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association, or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by imprisonment, not less than five, nor more than ten years."

It is settled, by authoritative decisions, that this court, in reviewing, on *habeas corpus* and *certiorari*, the action of a committing magistrate, who acts under the laws of the United States, will examine the evidence on which the commitment was grounded, and will do that which the magistrate ought to have done. (*Ex parte Bollman*, 4 *Cranch*, 75, 114; *In re Martin*, 5 *Blatch. C. C. R.* 303.)

I have examined the testimony put in before the commissioner in this case, and am entirely satisfied that

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In the Matter of Samuel R. Van Campen, on Habeas Corpus.

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there is sufficient evidence to hold the prisoner for trial, as having been guilty of embezzlement, and of making false entries, within the provisions of the statute cited. In *Ex parte Bollman* (4 *Cranch*, 75, 125), Chief Justice Marshall says, that the inquiry, in a case like this, being one which, without deciding upon guilt, precedes the institution of a prosecution, the question to be determined is, whether the accused shall be discharged or held to trial; and, in that case, as well as in the case of *Burr's Trial* (1 *Burr's Trial*, 11), he cites, with approbation, the remark of Blackstone, that if, upon such an inquiry, it manifestly appears that no such crime has been committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only is it lawful totally to discharge him; otherwise, he must either be committed to prison, or give bail. Chief Justice Marshall adds (1 *Burr's Trial*, 11), that the foundation of the proceeding must be a probable cause to believe there is guilt, and that this probable cause can only be done away in the manner stated by Blackstone. This probable cause (*Ex parte Bollman*, 4 *Cranch*, 75, 130), must be proved by testimony in itself legal, and which, though, from the nature of the case, it must be *ex parte*, ought, in most other respects, to be such as a court and jury might hear. In this case, there is probable cause shown, on legal testimony, to believe the prisoner guilty of embezzlement, and of making false entries, within the statute, and this probable cause has not been done away with in any manner.

It is objected that no evidence was given, before the commissioner, of the existence of the bank, or of the prisoner's official connection therewith. The record does not show that any such objection was taken before the commissioner. If it had been, the presumption, from the evidence, is, that the defect could have been supplied by proper official papers. The evidence against the prisoner is of such a character, that, even if this

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objection could prevail, I should not be at liberty to discharge the prisoner, but would be obliged to hold him, to give an opportunity to the prosecution to supply the proof wanting. But I think there is sufficient *prima facie* proof on both points. Two witnesses testified, without objection from the prisoner, to the existence *de facto* of an institution called the First National Bank of Elmira, and to the fact that the prisoner acted as president of it until October, 1867, when he resigned. There is also a great deal of testimony as to acts done by the prisoner as president, and directions given by him in that capacity. This is enough on an inquiry of this nature. It is sufficient, not only on the charge of embezzlement, but also on the charge of making false entries, with intent to defraud the bank. (The People *v.* Caryl, 12 *Wend.*, 547; The People *v.* Davis, 21 *Wend.*, 309, 313; The People *v.* Peabody, 25 *Wend.*, 472; Johnson *v.* The People, 4 *Denio*, 364, 368; The People *v.* Dennis, 1 *Parker's Cr. Rep.*, 469; The People *v.* Chadwick, 2 *Id.*, 163.)

In regard to the charge of making false entries, it is objected, that the prisoner did not personally make the false entries, but that they were made by a clerk in the bank, by the direction of the prisoner. This is sufficient to make the prisoner a principal in the offence, and to constitute a making of the entries by him. (United States *v.* Wilson, *Baldwin's C. C. R.*, 78, 103.)

An intent to defraud the bank is to be inferred from the fact of the embezzlement, and an intent to deceive its officers from the circumstances in evidence attending the false entries.

The indebtedness of the prisoner to the bank is claimed to be merely an overdraft, and not criminal. This is not so. Where a president of a bank, charged, as a trustee, with the administration of the funds of the bank in his hands, converts them to his own use, he embezzles and abstracts them, within the statute re-

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ferred to, unless he shows authority for so doing. There is sufficient evidence that the prisoner, while acting as president of the bank, converted to his own use over \$30,000 of the moneys of the bank, and he shows no warrant for so doing.

The writ of *habeas corpus* is discharged, and a warrant will issue to the marshal, under section thirty-three of the Act of September 24th, 1789 (1 *U. S. Stat. at Large*, 91), for the removal of the prisoner to the Northern District of New York.

*C. A. Seward* and *J. L. Ward*, for the prisoner.

*B. K. Phelps* (*Assistant District Attorney*), for the United States.

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MAY, 1868.

## IN THE MATTER OF LOUIS MEYERS, A BANKRUPT.

### STAYING PROCEEDINGS AGAINST A BANKRUPT.—FRAUDULENT CONVEYANCE.—RESULTING TRUST.

Where after a bankrupt had filed his petition and been adjudged a bankrupt, creditors who held judgments against him, and had proved their debts in the bankruptcy proceedings, commenced a suit in a State Court against him and others, charging that certain real estate which stood in the name of the bankrupt's wife, had been bought by him and paid for with his money in fraud of his creditors, and that a trust had resulted in their favor from such purchases, and praying that their judgments might be satisfied out of such property: *Held*, That, by proving their debts in the bankruptcy proceedings, the creditors waived all right of action against the bankrupts, on either the judgments or the original indebtedness; and that proceedings in such suit must be stayed, under the 21st section of the Bankruptcy Act.

That, if the allegations of the creditors were true, the money used by the bankrupt in the purchase of the real estate was "property conveyed by the bankrupt in fraud of his creditors," under the 14th section of the Act, and passed to the assignee in bankruptcy under that section.

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In the Matter of Louis Meyers, a Bankrupt.

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On the 8th of June, 1865, Martin Maas recovered a judgment, in the Supreme Court of New York, against the bankrupt, Louis Meyers, and one Sondheim, as joint debtors, for \$1,130.70. It was duly docketed and execution was issued on it and returned unsatisfied. It was now wholly due, with interest from January 8th, 1866. It was founded on two promissory notes of the debtors, one made July 18th, 1860, at eight months, for \$679.01, and one made August 25th, 1860, at eight months, for \$322.48, and an account for \$9.62, for goods sold. The consideration for the notes and account was goods sold to the debtors by Maas, in July, August, and September, 1860.

On the 9th of April, 1866, Bache, Ulman & Bach recovered a judgment in the Supreme Court of New York, against the bankrupt and Sondheim, as joint debtors, for \$1,167.08. It was duly docketed and execution was issued on it and returned unsatisfied, and it was now wholly due, with interest from its recovery. It was founded on a promissory note of the debtors, made August 10th, 1860, at eight months, for \$781.56. The consideration for the note was goods sold to the debtors by Bache, Ulman & Bach, in July, August and September, 1860.

On the 27th of March, 1868, Maas and Bache, Ulman & Bach commenced an action, in the Supreme Court of New York, against the bankrupt and his wife, the complaint in which, after setting forth the foregoing facts, averred that, while the bankrupt was so indebted to them, and while he was insolvent, and on or about the 14th of April, 1864, he purchased, with his own money and his own means, certain land in the city of New York, with the dwelling house thereon, particularly described in the complaint; that, on such purchase, the said house and lot of land were conveyed, by the direction of the bankrupt and at his request, to his wife, by the vendors, by a deed of conveyance recorded July 5th,

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In the Matter of Louis Meyers, a Bankrupt.

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1864; that the bankrupt paid the whole or the greater part of the consideration or purchase money of the conveyance, and more than sufficient thereof to pay the amount of the said two judgments and interest; that the consideration or purchase money was \$7,400; that the house and lot were now worth over \$20,000; that the conveyance was voluntary and without consideration, as between the bankrupt and his wife, and was founded upon no other consideration, as between grantor and grantee, than the purchase money, so paid by the bankrupt, and was fraudulent, as against the plaintiffs in the suit, as his creditors; that, on such conveyance, the legal title, in fee simple, to the house and lot, vested in the wife of the bankrupt and was still in her, and a trust resulted in favor of said plaintiffs, as creditors of her husband, to an extent sufficient to satisfy their demands, being the amount of the said two judgments and interest; and that Sondheim was insolvent and had been so since prior to the purchase of the house and lot. The prayer of the complaint was for judgment that the trust might be established and declared, that the plaintiffs might be entitled in equity to enforce the trust, that the wife of the bankrupt might be declared to be the trustee thereof, and that, unless she should pay to the plaintiffs the amount upon their judgments, with interest, the house and lot might be sold by a receiver to be appointed by the court, and that out of the proceeds the judgments and interest might be paid.

On the 13th of February, 1868, and before the said suit was commenced, the bankrupt filed his voluntary petition in bankruptcy. The creditors above named proved their said debts in the bankruptcy proceedings. On the 10th of April, 1868, this court made an order staying all proceedings in the said action until the question of the discharge of the petitioner in bankruptcy should be determined by this court. The creditors now applied to the court for an order vacating and setting aside such order of stay.

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In the Matter of Louis Meyers, a Bankrupt.

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For the creditors, *A. R. Dyett*.

For the bankrupt, *Benedict & Boardman*.

BLATCHFORD, J. The order of stay was made under that part of section twenty-one of the Bankruptcy Act which provides that "no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt, and all proceedings already commenced, or unsatisfied judgments already obtained thereon, shall be deemed to be discharged and surrendered thereby ; \* \* \* and any such suit or proceedings shall, upon the application of the bankrupt, be stayed, to await the determination of the court in bankruptcy on the question of the discharge." The action in question, so far as concerns the bankrupt as a defendant in it, is a suit for the debts set forth in the complaint, a suit to collect such debts, and the creditors, by proving such debts in the bankruptcy, waived all right of action thereon against the bankrupt, and the judgments, so far as they were judgments against the bankrupt, were thereby discharged and surrendered. This view applies, whether the action be regarded as founded on the original indebtedness or on the judgments. The order of stay was, therefore, proper, as respects the bankrupt. It is urged, however, that the suit ought to be allowed to proceed against the wife, as a suit to have the debts paid out of real estate of which the legal title is in the wife, and to enforce a trust created by the statute law of New York, in favor of the creditors, it being provided thereby (1 R. S. 728, §§ 51, 52), that "where a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made, but the title shall vest in the person named as the

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*In the Matter of Louis Meyers, a Bankrupt.*

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alienee in such conveyance," subject only to the provision, that "every such conveyance shall be presumed fraudulent as against the creditors at the time of the person paying the consideration, and, where a fraudulent intent is not disproved, a trust shall result in favor of such creditors, to the extent that may be necessary to satisfy their just demands." It is claimed, that the real estate in question was, therefore, never the property of the bankrupt, and could not pass to his assignee in bankruptcy; and that it does not pass to such assignee under section fourteen of the Act, as being "property conveyed by the bankrupt in fraud of his creditors," because it never was conveyed by the bankrupt. This view overlooks the true character of the suit brought by the creditors in the State Court. Their complaint shows that the bankrupt took his own money and made the purchase of the house and lot; that, on such purchase, it was conveyed by the vendors to the bankrupt's wife; that the purchase money so paid by the bankrupt was more than enough to pay the judgments; that the transaction was fraudulent as against the creditors; and that a trust resulted in favor of the creditors, to an extent sufficient to satisfy their demands. This trust they seek to have enforced against the house and lot, as representing the money so fraudulently applied by the bankrupt. The fraud, and the only fraud, committed by the bankrupt was in taking his own money and using it in this way. Therefore, on the case set up by the creditors in their complaint, the money so used and applied by the bankrupt, as now represented by the house and lot, is "property conveyed by the bankrupt in fraud of his creditors." As such, it passed, by virtue of section fourteen of the Act, to his assignee in bankruptcy, and he can sue for and recover such property. Any equitable right which the creditors had to enforce any trust created by the law of New York in their favor, in respect to such money or its representative, and any equitable right conferred on them



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The Ship Thornton.

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by the bringing of their suit, is subordinate to the right and title of the assignee in bankruptcy. His title relates back to the 13th of February, 1868. The suit of the creditors was brought afterwards. The equitable right to enforce the statutory trust is not such a lien or pledge as is saved or protected, as against the assignee, by the provisions of the fourteenth or twentieth or any other section of the Act.

The motion to vacate the order of stay is denied.

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MAY, 1868.

## THE SHIP THORNTON.

## COLLISION IN A DOCK.—VESSEL HAULING OUT.—LINES.

Where a schooner, coming into a slip, was made fast by lines to a ship, by the permission of those in charge of the ship, and thereafter the ship desired to leave the slip, and those in charge of the schooner were requested to cast off the lines, and, all parties supposing that they were cast off, the ship was hauled out by a tug, and, in being hauled out, came in contact with and injured the schooner, which collision the schooner claimed to have been caused by the ship's being allowed to fall upon the schooner with the tide, and the ship claimed to have been caused by a line which should have been cast off but was not, and which pulled the schooner towards the ship :

*Held*, That, in either case, the ship was liable for the collision. It was the duty of the moving vessel to be certain that all the lines were unfastened before she began to move.

BLATCHFORD, J. This is a libel for a collision which occurred in the harbor of New York, between the schooner James Bolton and the ship Thornton, on the 26th of January, 1867, about 10 o'clock, A. M., in the slip between piers 26 and 27 East river. The schooner came into the slip on the evening before, and, by the permission of those in charge of the ship, the ship being then moored to the lower side of pier 27, with her bow headed to the shore, was fastened by two lines to the

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The Ship Thornton.

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port side of the ship. The next morning, the ship being about to start to go to sea, those in charge of her requested the persons on board of the schooner to cast off the lines which fastened the schooner to the ship, and which lines belonged to the schooner. The evidence is, that the persons in charge of the ship, as well as those in charge of the schooner, supposed that all lines fastening the schooner to the ship were removed before the ship started. She started, pulled out backwards by a steam tug. The tide was flood, with running ice. The schooner lay angling towards the ship, the bow of the schooner towards the bow of the ship, and the bow of the schooner nearer to the bow of the ship than the stern of the schooner was to the ship, there being a space of several feet between the bow of the schooner and the ship. The port side of the schooner was fastened to vessels on that side of her. The ship, as she went out, came into collision with the schooner and damaged her seriously. The claim on the part of the schooner is, that the flood tide carried the stern of the ship up and forced her bow down and away from pier 27 and against the schooner, and caused the collision, and that there was room enough for her to have gone out straight without touching the schooner, if she had been properly managed, and that there was negligence and carelessness in the manner in which she was attached by a hawser to the tug, and that thereby her bow was permitted to swing down against the schooner. On the part of the ship it is claimed that the ship went out parallel with pier 27, and that her bow did not fall off against the schooner, but that, after she began to move, the bow of the schooner was pulled towards the ship, and it was then discovered that a line was left fastened from the starboard side of the schooner to the port quarter of the ship, which pulled the schooner around, so as to cause the collision and do the damage, and that the collision was the fault of those in charge of the schooner, in carelessly permitting the line to remain fastened.

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The Ship Thornton.

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There is much conflicting testimony in regard to whether a line was left fastened or not from the schooner to the ship when the ship started, and as to whether the ship moved against the schooner or pulled the schooner by the line against the ship. But, in the view I take of the case, it is not important to reconcile or solve this conflict, for, in any aspect of the case, I think the collision was wholly the fault of the ship. The schooner was moored and motionless. The ship was moving. It was the duty of the ship not to collide with the schooner. If there was no line fastened from the schooner to the ship, then the ship must have fallen off from pier 27 and moved against the schooner, and it was negligence in her to do so, and she must bear the consequences. If there was a line fastened, as that line had been so fastened by the consent and permission and with the knowledge of those in charge of the ship, it was their duty to assure themselves, beyond mistake, that the line was unfastened before they moved the ship, and it was negligence in them to move the ship with such line fastened. As between the two vessels, under the circumstances, the duty of seeing that the line was unfastened rested wholly on the ship. If the schooner had attempted to move out of the slip, the ship remaining at rest, it would then have been the duty of those on board of the schooner to have seen that the line was unfastened, and the schooner would have been solely responsible for all consequences to herself and to the ship of her negligently moving with the line unfastened.

There must be a decree against the ship for the damages caused by the collision, with a reference to a commissioner to ascertain and report the damages.

*W. Q. Morton and J. K. Hill, for the libellants.*

*Beebe, Dean & Donohue, for the claimants.*

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In the Matter of John P. Smith and James Smith, Involuntary Bankrupts.

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MAY, 1868.

IN THE MATTER OF JOHN P. SMITH AND  
JAMES SMITH, INVOLUNTARY BANKRUPTS.

LIEN OF JUDGMENT.—EXECUTION AND LEVY.

Where, before a petition in involuntary bankruptcy was filed, two judgments had been entered, in a State court, against the bankrupts, on each of which executions had been issued to a sheriff, and he had made an actual levy, under the first one which came to his hands, on personal property of the bankrupts, they also having real estate on which the judgments were liens, the validity and *bona fides* of the judgments not being attacked:

*Held*, That the receipt, by the sheriff, of the second execution, after the levy made under the first one, operated as a constructive levy under the second one, and an actual levy under it was unnecessary.

That the judgments were liens on the real estate of the bankrupts, as against the assignee in bankruptcy, and came within the saving clauses of sections fourteen and twenty of the Bankruptcy Act.

That the sheriff, therefore, should be allowed to sell the personal property, to satisfy the two executions, and, if there was not enough to satisfy them, the deficiency would continue a lien on the real estate, and the court would then determine, on the application of the assignee, how it should be discharged.

BLATCHFORD, J. The facts in this case are as follows: On the 25th of October, 1867, John F. Barkley and Jacob C. Turfler recovered a judgment in the Supreme Court of New York, against John P. Smith and James Smith, the bankrupts, for \$334.10. A transcript of said judgment was filed and docketed in the office of the clerk of the county of Rockland, where the debtors resided, and where real estate owned by them was situated, on the 29th of October, 1867. By the filing and docketing of such transcript, the judgment, according to the law of New York, became a specific lien on such real estate. On the 30th of October, an execution, issued on the judgment to the sheriff of Rockland county, was received by him. Under that execution, he, on the 1st of November, 1867, made a levy on certain personal property of the bankrupts.

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In the Matter of John P. Smith and James Smith, Involuntary Bankrupts.

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On the 2d of November, 1867, John W. Morgan and William H. Morgan recovered a judgment in the Supreme Court of New York, against the bankrupts, for \$213.91. A transcript of said judgment was filed and docketed in the office of the clerk of the county of Rockland, on the 4th of November, 1867. On the 5th of November, at 10 o'clock A.M., an execution, issued on this judgment to the sheriff of Rockland county, was received by him. Nothing was done by the sheriff under that execution, except to hold it.

On the 5th of November, 1867, at 3 o'clock P.M., the petition in this matter, it being a case of involuntary bankruptcy, was filed.

The assignee in bankruptcy does not contest the validity of either of the judgments, or impeach the *bond fides* of the executions, or of the liens, whatever they were, acquired by the recovery of the judgments and the issuing of the executions and the levy, nor does he object to the application to the executions, in their order, of the proceeds of the personal property actually levied on by the sheriff under the first execution. The receipt of the second execution, after the levy under the first one, and while such levy remained in force, operated as a constructive levy under the second, and an actual levy under it was unnecessary. (*Cresson v. Stone*, 17 *Johns.*, 116; *Van Winkle v. Udall*, 1 *Hill*, 559.)

The judgments became, both of them, liens on the real estate of the bankrupts, as against the assignee in bankruptcy, such liens having been perfected before the commencement of the proceedings in bankruptcy. The liens on the real estate, by the docketing of the judgments in Rockland county, and the levy under the first execution, it operating also as a levy for the second execution, are such liens as are within the saving clauses of sections fourteen and twenty of the Bankruptcy Act.

An order will, therefore, be made, that the sheriff be at liberty to sell the personal property on which he

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The Canal Boat Excelsior.

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levied, or so much thereof as may be necessary to satisfy the two executions, and apply the proceeds thereto in the order of the receipt of the executions by him. If there shall be any deficiency to satisfy either execution, it will continue to be a lien on the real estate, and it will then be for the court to determine, on the application of the assignee or the creditor, on notice, whether the lien shall be discharged by the assignee under General Order No. 17, or whether some other of the courses provided for by sections fourteen and twenty shall be adopted. The assignee objects to paying the deficiency out of the personal property of the bankrupt in his hands. No reason for this objection is assigned. Under section fourteen, the assignee is authorized, under the direction of the court (and General Order No. 17 was made to carry out this provision), to discharge a lien on real estate, or to sell the real estate, subject to the lien.

*John Henry Hull*, attorney for J. W. & W. H. Morgan.

*W. S. Hascall*, attorney for Barkley & Turfler.

*A. Fallon*, attorney for assignee.

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MAY, 1868.

## THE CANAL BOAT EXCELSIOR.

## FREIGHT.—AGREEMENT TO SELL VESSEL.

Where the master and owner of a canal boat, which was in Hudson, with a cargo on board, bound to Philadelphia, agreed to sell her for \$1,000, and to take on board at Philadelphia an engine belonging to the purchasers, and deliver it to them with the boat at New York, on or before a certain day, they to pay all tolls, and the vessel went to Philadelphia and took on board the engine and brought it to New York, and the owner of the boat was not then able to give

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The Canal Boat *Excelsior*.

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the purchasers a good title to the boat, and the latter tendered the tolls and demanded the engine, which the master did not deliver, and they libelled the boat to recover its value:

*Held*, That the purchasers were not bound to pay or tender the \$1,000 till they received the boat and a good title to her, and the engine.

That any freight on the engine was part of the \$1,000.

That the purchasers, having tendered the tollage, were entitled to the engine free of all lien for freight.

BLATCHFORD, J. This is a libel to recover the value of a steam engine, owned by the libellant, John S. Ray. The libel alleges that, in April, 1868, the canal boat took the engine on board at Philadelphia, to be transported to New York, subject only to tollage; and that the boat, with the engine on board, has arrived at New York, and the libellant has tendered the tollage, but the master of the boat refuses to deliver the engine, which is of the value of \$600.

The defence set up in the answer is, that, on the 7th of April, 1868, an agreement in writing was made between the master of the boat, who was her owner, for the sale of her to the libellant and one Rockefeller, the terms of which were, that the master was to sell the boat for \$1,000, she then being at Hudson, (N. Y.) loaded with marble; that she should go with that cargo to Philadelphia, and be delivered at New York on or before April 21st; that, upon such delivery, the \$1,000 should be paid; that, for the same consideration, the master should take on board of her, at Philadelphia, a steam engine belonging to the libellant and Rockefeller, and deliver it with the boat at New York, on or before April 21st, they to pay all expense of tollage. The answer avers, that the engine was transported under that agreement and no other; that the claimant was prevented from delivering the boat at New York on the 21st, by the failure of the other parties to have the engine in readiness for shipment; that the claimant arrived with the boat at New York on the 25th, and offered to deliver the engine and the boat according to the contract on that day; that the

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The Canal Boat Excelsior.

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other parties did not accept them, but refused to receive them, and it was agreed between the parties that every thing should remain as it was, and the engine should remain on board of the boat until the return of the claimant from Philadelphia on the 28th, but that the libellant, in violation of such agreement, commenced this suit before the return of the claimant; that the claimant is ready and willing to perform the agreement on his part; and that the other parties have failed to perform it.

I think, on the evidence, that this defence fails. It appears, that the claimant did not have the legal title to the boat so that he could convey it by a bill of sale. He had an equitable title only. The money to buy the boat for him had been advanced by a friend of his in Philadelphia, who took a bill of sale of the boat in his own name. The claimant was entitled to receive a bill of sale of the boat from his friend whenever he should reimburse the money. These facts were not disclosed when the agreement of sale was made. When the claimant was in Philadelphia with the boat, he endeavored to procure a bill of sale to himself for the boat, but his friend was too ill to transact business. The claimant had not reimbursed the money to him, nor has he yet done so fully, and he is not now entitled to demand a legal title to the boat, nor is he yet in a condition to convey one. This difficulty was disclosed by him to the other parties when he reached New York with the boat. They were not bound to pay or tender the \$1,000 till they received the boat and a good title to her, and also the engine. The \$1,000 was to be the consideration for the purchase of the boat and for the transportation of the engine. The engine has been transported, and is the property of the libellant. He proves that he has tendered the tollage to the proper party, and I think he is entitled to the possession of his engine free of all lien or charge for freight. He was so entitled when this suit was brought. Any freight on it is a part of the \$1,000. After the claimant shall have



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In the Matter of Tattnall Baily, a Bankrupt.

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made proper delivery of both boat and engine, he may be entitled to the \$1,000, but not till then. Meantime he has no right to withhold the engine, the tollage having been tendered.

There must be a decree for the libellant, with costs, with a reference to a commissioner to ascertain the damages sustained by the libellant.

*Beebe, Donohue & Cooke*, for libellant.

*Benedict & Benedict*, for claimant.

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MAY, 1868.

## IN THE MATTER OF TATTNALL BAILY, A BANKRUPT.

### PLACE OF DOING BUSINESS.

Where a bankrupt did not reside in the Southern District of New York during the next six months preceding the filing of his petition, but, before his insolvency, had been in business in New York city, and had, during the whole of the said six months, carried on business in New York city as the agent and attorney of his brother, in buying and selling merchandise, keeping an office for that purpose with his brother's name upon the sign:

*Held*, That the petition in bankruptcy was properly filed in the Southern District of New York.

In this case the petition was filed on February 29th, 1868, and set forth that the petitioner had carried on business for six months, next immediately preceding the filing thereof, at the city of New York.

A paper was afterward filed with the register by the bankrupt's attorney, declaring that the bankrupt did not reside within the Southern District of New York during any part of the six months aforesaid; that for some time before his insolvency, he carried on business, on his own

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One Vaporizer, &c.

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account, in the city of New York, and from that time to the filing of his petition, and during the whole of the said six months, had been carrying on business as the agent and attorney of his brother, in buying and selling merchandise, keeping an office for that purpose in the city of New York, with his brother's name upon the sign, and well known to those who had dealings with him as so carrying on business at that office, the business having been done under a power of attorney and for a compensation of one half of the profits.

The register certified to the court the question, whether the bankrupt was carrying on business in the Southern District of New York, within said six months, giving it as his opinion that he was, and distinguishing this case from the case of *Magie* (*ante*, p. 369.)

BLATCHFORD, J. I am of opinion that the petitioner was carrying on business, for the six months next immediately preceding the filing of his petition, in the Southern District of New York, within the meaning of the eleventh section of the Bankruptcy Act.

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## Eastern District of New York.

MAY, 1868.

### ONE VAPORIZER, &c.

#### DISTILLING.—USING ALCOHOLIC VAPOR IN MAKING VINEGAR.

Where a manufacturer of vinegar, in good faith, used a "Foubert's Patent Vinegar Apparatus," in which a mash, fermented in the same way as for the production of whisky, was used, and, by the application of heat, alcoholic vapor was produced, which passed directly into a chamber, where it was condensed by cold water and vinegar, and the mixture, passing thence to standards, was there oxidized, and thence flowed out in the form of vinegar—alcohol, as known in commerce, being present at no stage of the process :

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One Vaporizer, &c.

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*Held*, That the manufacturer was not a distiller within the meaning of the sixteenth section of the Act of March 2d, 1867 (14 *U. S. Stat.*, §81), and the apparatus was not liable to forfeiture for nonpayment of the special tax imposed on distillers.

That the mixture was not a "product of distillation" under the Joint Resolution of February 5th, 1864 (14 *Id.*, p. 566.)

This was a proceeding *in rem*, on behalf of the United States, to enforce the forfeiture of certain property, which was, at the time of its seizure, being used by the claimant in the manufacture of vinegar. The property in question consisted of a still, or vaporizer, connected at the top with a set of ordinary vinegar standards, by means of a chamber, designated in the diagram by the letter M, constituting together an apparatus known as "A. Foubert's patent vinegar apparatus."

This apparatus, it was conceded, was used by the claimant, in good faith, for the manufacture of vinegar, and nothing else. But it was contended, on the part of the Government, that the process of making vinegar by the apparatus consisted, in part, of distilling spirit from an ordinary mash, and that, therefore, the property was liable to forfeiture, inasmuch as the claimant had never paid the special tax imposed by law on distillers.

The cause was tried before the court, without a jury, and, for the most part, upon a statement of facts agreed upon between the parties.

BENEDICT, J. This case presents an ingenious device for the evasion of the tax upon distilled spirits.

The claimant is a manufacturer of vinegar, an article produced, as is well known, by the oxidation of alcohol. The ordinary method of producing this article, when what is known as the "Quick method" is used, is to mix whisky, or some other alcoholic fluid, with a quantity of water and some strong vinegar, and then pass the mixture slowly through tubs filled with shavings saturated with vinegar, in which tubs, or standards, as they

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One Vaporizer, &c.

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are called, the alcohol is very thoroughly exposed to the action of the air ; and the vinegar in the mixture, and in the shavings, acting as a ferment, the alcohol in the mixture is enabled to combine with the oxygen of the air, oxidation ensues, and the product flows from the standards in the form of pure vinegar. The method pursued by the claimant differs from the ordinary method in this, that instead of using whisky—an article subject to a high tax—he uses a mash, fermented in the same manner as a mash to be used for the production of whisky, which is placed in an ordinary vaporizer, or still, and, by the application of heat, alcoholic vapor is produced from it. The still has, however, no worm or doubler connected with it; but the alcoholic vapor, when produced, passes directly from the head of the still into a chamber (M), which connects the head of the still with a set of vinegar standards. In this chamber (M), the alcoholic vapor comes in contact with a mixture of cold water and vinegar, which is flowing slowly through the chamber toward the standards; the vapor, thus passing into this cold fluid, is condensed, and there is formed a mixture of alcohol, water, and vinegar, which passing to the standards, is there fully oxidized in the manner above described, and flows out below in the form of vinegar. Thus it is seen, that while at no stage of the claimant's process is there to be found the fluid known as alcohol, or distilled spirits of commerce, the product of the whole process is vinegar made by the oxidation of alcohol. The object of the apparatus is manifestly to evade the tax imposed by law upon distilled spirits; and the question is, whether the tax can thus be evaded without a violation of the law.

To bring the claimant within the provisions of the law, he must be found to be a distiller. As a manufacturer of vinegar, he is subject to no tax; but if he be a distiller within the meaning of the Internal Revenue law, then he is subject to all the provisions of the law applicable to the makers of distilled spirits.

The Act of 1867, § 16 (14 *U. S. Stat.*, p. 481), thus defines a distiller: "Every person, firm, or corporation who distills or manufactures spirits or alcohol; or who brews or makes mash, wort, or wash for distillation, or the production of spirits, shall be deemed a distiller; and the making or keeping, by any person, of grain, mash, wash, wort, or beer, prepared or fit for distillation, together with the possession by such person of a still, or other apparatus, capable of use for distilling upon the same premises, shall be deemed and taken as presumptive evidence that such person is a distiller."

Now, if the case rested simply upon the fact of the possession of the still, and the making of a mash fit for production of distilled spirits, the claimant might, perhaps, have been held to be a distiller of spirits, under this section of the Act.

But the presumption which, under the law, arises from the possession of a still and mash capable of being used for the production of spirit, is in this case, as it appears to me, repelled by the further fact, that neither the still, nor the mash, is used with intent to produce distilled spirits. This is clearly so, if the intent to be considered is the intent with which the apparatus, as a whole, is used; for it is conceded that the product of the apparatus, as a whole, is simply vinegar, which contains no alcohol; while, if the intent to be considered is the intent with which the still and mash alone, as separated from the rest, are used, it seems, also, to be clear that they cannot properly be said to be used to produce distilled spirits. The only use of this still and mash is to form the mixture which is contained in the chamber (M); but that mixture is not distilled spirits, or alcohol. It contains alcohol, it is true, but in such a combination that it cannot be obtained from it by any mechanical or chemical process, and the elements of the mixture are such, that the alcohol in it is, from the moment of its condensation into a fluid, in process of destruction, for

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One Vaporizer, &c.

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the vinegar and water in which the alcoholic vapor is condensed begins at once to act as a ferment, and oxidation of the alcohol accordingly then begins.

The mixture is neither the distilled spirits of commerce, nor is it of value as a merchantable article, nor can it be used for any purpose, except to make into vinegar.

Considered, then, in either aspect, either as a manufacturer of vinegar, or of the mixture which is produced in the chamber (M) of his apparatus, I am unable to see how the claimant can be held to be a manufacturer of distilled spirits or alcohol.

His process appears to be simply transferring alcohol by the action of heat, and in the form of vapor, from one mixture—the mash—where it is not taxable, to another mixture, from which it can be separated only by distillation, and where it is equally free from tax; the latter mixture being never distilled, but used and useful only to oxidize into vinegar, which is also free from tax.

The use of such a process does not, in my opinion, constitute the claimant a distiller of spirits within the meaning of the law.

Nor does the joint resolution of February 5, 1864 (14 *Stat.*, p. 566), help the case of the Government. By that resolution, it is enacted that all productions of distillation which contain distilled spirits or alcohol, on which the tax imposed by law had not been paid, should be considered and taxed as distilled spirits.

But neither the vinegar which the claimant manufactures, nor the fluid which he produces in the chamber (M) of his apparatus, can be said to be a "product of distillation." Certainly, the vinegar and the water, which form the greater portion of the fluid in the chamber (M) are no product of distillation. To make the resolution applicable, the whole mixture which contains the alcohol, must be a product of distillation. To hold otherwise, and, under this resolution, consider every article containing

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In the Matter of Cornelius Olcott, a Bankrupt.

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distilled spirits, which has not paid the tax, as distilled spirits, would lead to strange results, especially when so little of the distilled spirits in use ever pays tax.

I have thus considered the case upon the evidence as it appears in the agreed statement of facts. I am not, under the admissions in this statement, at liberty to consider the question, whether the apparatus of the claimant is not, in some of its fixtures, a still which forms distilled spirits by condensation of alcoholic vapor upon a cold surface, and then conveys the same, in its ordinary fluid form, to the vinegar and water in the chamber (M). If such a fact were made to appear, it might materially alter the case; but upon this record no such fact appears.

The judgment in the case, as the evidence stands, must accordingly be in favor of the claimant of the property.

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MAY, 1868.

## IN THE MATTER OF CORNELIUS OLCOTT, A BANKRUPT.

### INJUNCTION.—EXECUTION.

Where an execution had been issued on a judgment against a bankrupt, and a levy made under it, and thereupon, on the filing of a petition in bankruptcy by the judgment debtor, an injunction was issued restraining proceedings on the execution, and thereafter a motion was made to dissolve the injunction, on which the bankrupt produced affidavits to show that he had no interest whatever in the property levied on:

*Held*, That, as the assignee, though notified of the proceedings, had taken no steps to acquire possession of the property, and as it did not appear that the proceedings of the creditor under the execution would affect any one who was entitled to the protection of the court under the Bankruptcy Act, the injunction would be dissolved.

In this case the petition of the bankrupt was filed in July, 1867, and on an affidavit of the bankrupt, an order

was made, enjoining the Ocean Bank from proceeding under an execution issued upon a judgment against the bankrupt, under which execution a levy had been made upon certain personal property as being the property of the bankrupt.

The assignee in bankruptcy was appointed in August, 1867. In November, 1867, a motion was made in behalf of the bank, to dissolve the injunction, which was from time to time adjourned. The question whether there was a valid levy upon the property under the execution, was contested.

BENEDIOT, J. This is a motion made by the Ocean Bank to dissolve the injunction heretofore granted, restraining the bank from further proceedings upon an execution issued against the bankrupt, by virtue of which the bank claimed to have levied upon certain personal property.

In the aspect which the case now presents, I do not deem it necessary to consider, upon this motion, the question whether the bank had or had not a valid levy upon the property described in the papers; for the bankrupt, as it appears, makes no claim to the ownership or possession of this property, but, on the contrary, expressly declares that it is the property of his wife, and that he has no interest whatever in it; while the assignee in bankruptcy, having been appointed and notified of these proceedings, and having had abundant time and opportunity, does not see fit to take any steps to acquire possession of the property, and asks no relief at the hands of the court in relation thereto.

Inasmuch, therefore, as it does not appear that the proceeding of the bank against the property in question will affect the interests of any party entitled to the protection of this court under the Bankruptcy Act, no reason exists why the power of the court should be exercised to stay such proceedings.

The injunction, therefore, is dissolved.



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The Ship Ben Adams.

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## Southern District of New York.

JUNE, 1868.

### THE SHIP BEN ADAMS.

#### BILL OF LADING.—DELIVERY.—MARKS AND NUMBERS.

Where flour was shipped on board of a vessel at New Orleans, bound for New York, by two different shippers, the flour being all branded, "Nonpareil Mills," but the two different lots having also other brands by which they were easily distinguishable, and, for one lot of 1,000 barrels, being of a better quality and a higher value than the other, which was shipped first, a bill of lading was given, in which the flour was stated to be "marked and numbered as in the margin," the entry in the margin being simply "1,000 bbls. 'Nonpareil Mills,'" and on the arrival of the ship at New York, only 439 barrels of the 1,000 were delivered to the consignee, but, all the flour marked "Nonpareil Mills" having been discharged on the dock, a portion of the 1,000 barrels was taken away by the consignee of the other lot of flour, who was allowed to take it by the delivery clerk having charge of the delivery of the cargo:

*Held*, That the consignee of the 1,000 barrels was entitled to a delivery of the identical barrels shipped, and was entitled to a decree against the ship for the damages occasioned by the nondelivery to him of the whole number of barrels shipped to him, less the freight and primage.

BLATCHFORD, J. This is a libel filed by Partridge, Wells & Co., of New York, against the ship Ben Adams, to recover \$7,012.50, as the value of 561 barrels of flour, shipped by the Ben Adams, at New Orleans, on the 13th of March, 1865, by T. Prudhomme, consigned to the libellants at New York, under a bill of lading signed by the master of the ship therefor. The bill of lading was for "one thousand barrels of flour, being marked and numbered as in the margin." The entry in the margin was "1,000 bbls. 'Nonpareil Mills.'" The one thousand barrels were, all of them, when put on board of the ship, branded as follows, on one of the heads of each barrel: An outer circle of scroll-work; next

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The Ship Ben Adama

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within, in a circular form, occupying about two-thirds of the upper part of the circle, with the concave part downwards, the words, "Nonpareil Mills," the remaining one-third, or lower part, of the same circle, being filled up, with the concave part upward, with the words, "St. Louis, Mo.;" next within, a circle of scroll-work; within that circle, the words and figures, "196, choice extra, John F. Tolle." There were, on board of the same ship, on the same voyage, 596 other barrels of flour, all of them, when put on board, branded as follows, on one of the heads of each barrel: An outer circle of scroll-work; next within, in a circular form, occupying one-half of the upper part of the circle, with the concave part downward, the words, "Nonpareil Mills," the remaining one-half, or lower part, of the same circle, being filled up, with the concave part upward, with the words, "A. S. Browning & Co.;" within that circle the words and figures, "196, choice extra." These 596 barrels were of a quality much inferior to the flour shipped by Prudhomme, and were worth considerably less per barrel in the market. They were put on board the vessel on the 4th of March, 1865—that is, nine days before the Prudhomme flour was put on board—and were shipped by Given, Watts & Co., of New Orleans, to Watts, Crane & Co., of New York, under a bill of lading which specified the mark on them as being "Nonpareil." The allegation of the libel is, that the ship arrived at New York, with the 1,000 barrels of the Prudhomme flour, but that only 439 barrels of it were delivered to the libellants. Besides the 1,000 barrels and the 596 barrels, there were on board of the vessel 4,690 other barrels of flour, of various brands, but none of them branded "Nonpareil."

The defence set up in the answer is, that, on the arrival of the ship at New York, notice of her arrival, and of the place of discharge of her cargo, was given to the libellants; that, in accordance with the usage of the port, the flour was discharged from the ship on pier 19,

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The Ship Ben Adams.

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East River, and was thenceforth at the risk of the libellants, who thereupon undertook to remove it; that thereby the bill of lading was discharged; that the ship had on board the 596 barrels, branded "Nonpareil Mills," consigned to Watts, Crane & Co.; that, previous to the 29th of April, 1865, there had been discharged from the ship, and placed on the wharf, 978 barrels of flour, branded "Nonpareil Mills"; that, of this number, the libellants carted away 439 barrels, and suffered and allowed Watts, Crane & Co. to cart away 539 barrels; and that such flour was taken by the consignees respectively, after it had been landed on the dock, and without any notice to the vessel that there was any difference in the two parcels, in quality or brand, and without any actual knowledge on the part of the master or owners of any such difference. The answer closes with an averment that the claimants have always been ready and willing to deliver to the libellants, "on payment of freight, the remaining 561 barrels of flour shipped at New Orleans, branded "Nonpareil Mills."

This answer sets up grounds of defence that are inconsistent with each other. It sets up that the bill of lading for the 1,000 barrels was discharged by the unloading of them on the wharf, and that the libellants negligently allowed Watts, Crane & Co. to cart away 539 barrels, branded "Nonpareil Mills"; and it also sets up a willingness to deliver to the libellants 561 barrels of flour, which are not the barrels shipped by Prudhomme. If the 561 barrels were delivered so as to discharge the bill of lading, or if, as to the 539 barrels, it was the negligence of the libellants which allowed Watts, Crane & Co. to take them, then the ship is not responsible in respect of what was so delivered, or so lost through the negligence of the libellants. But if the ship is responsible for the 561 barrels, then the libellants are entitled to the identical 561 barrels shipped by Prudhomme, or their value, and the contract of affreightment cannot be dis-

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The Ship Ben Adams.

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charged by turning over to the libellants 561 barrels of the other and inferior flour consigned to Watts, Crane & Co.

The ship was bound to discriminate between the two parcels of flour, marked "Nonpareil," and to see that each consignee received the proper flour. The 596 barrels shipped to Watts, Crane & Co. were taken on board and stowed, on the evidence, several days before any of the Prudhomme flour was put on board. The latter flour was nearer the top of the cargo, and came out before the other. It does not appear that the shipper of the Prudhomme flour knew, or had notice, that there was any other flour on board of the ship, marked "Nonpareil." It was the business of the ship to know that, and to see that a proper discrimination was made in the Prudhomme bill of lading, and on the ship's manifest, and on the cargo book of the ship, between the "Nonpareil" flour of Prudhomme, and the other "Nonpareil" flour previously put on board. Prudhomme was not called upon, on the facts in this case, to exercise any caution on that subject. The barrels he offered for shipment had marks on them sufficient to show to those in charge of the vessel that there was a likelihood that, without proper care, such barrels might be mistaken for those previously shipped by Given, Watts & Co., and also to show that, with proper care, their identification could be easily secured. Those in charge of the ship chose to throw away all precautions, and to enter on the bills of lading and on the manifest, in regard to both parcels, simply the word, "Nonpareil"; and the conduct of those charged by the claimants with the delivery of the flour at New York, and the language of the answer in the case, serve to show that the obligation of the vessel to both of the consignees is supposed to be discharged by delivering to each the proper number of barrels branded "Nonpareil," whether they are, or not, the identical barrels for which the bills of lading were

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The Ship Ben Adams.

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respectively given. Such was not the obligation of the ship. The libellants are entitled to the identical 561 barrels shipped by Prudhomme, or their value.

The bill of lading in this case has not been discharged by the ship. It is, undoubtedly, the law, that delivery on the wharf, in the case of goods transported by a vessel, is sufficient, if due notice be given to the consignees, and the different consignments be properly separated, so as to be open to inspection by their respective owners. But, where they are delivered on the wharf, there must, in addition to due and reasonable notice to the consignee, be a fair opportunity afforded to him to remove his goods (*The Eddy*, 5 *Wallace*, 481, 495). And the carrier is responsible for the value of the goods, if he delivers them to the wrong person, even though by mistake or imposition (*Story on Bailments*, § 545, *b.*; *The Huntress*, *Davis' R.*, 82, 87). The due and proper separation and designation of the goods by the carrier, for the use of the consignee, is insisted on by all the authorities, as an indispensable prerequisite, in addition to notice to the consignee of the time and place of delivery, to relieve the carrier from responsibility (3 *Kent's Comm.*, 215; *The Eddy*, *above cited*).

In the present case, the ship assumed the obligation of delivering the flour to the proper parties, and undertook to discharge it by employing a clerk, who was stationed on the wharf, and whose business it was to receive orders for the flour, addressed to the ship, and to fill them. Not a barrel of flour was allowed by this clerk to be taken from the wharf, unless a written order for it, addressed to the ship, was presented to and left with him. On the 18th of April, Watts, Crane & Co. gave a written order to the ship to deliver 596 barrels, branded "Nonpareil." On that order, the clerk delivered 539 barrels of the 1,000 barrels shipped by Prudhomme. Watts, Crane & Co. received those 539 barrels, and the libellants did not receive any of them. Before any flour

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The Ship Ben Adama

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was delivered from the ship, due notice was given to the libellants of the arrival of the vessel at New York, and that she had on board merchandise for them, and that she was discharging at pier 19, East River. But, as the libellants' flour came out, it was not properly separated, so as to be open to inspection by them, nor was a fair opportunity afforded to them to remove it, nor was it designated for their use by the clerk; but, on the contrary, the clerk designated the 539 barrels for the use of Watts, Crane & Co., and wrongfully delivered it to them, and gave the libellants no opportunity to take it. The cartmen of the libellants took no flour, except 439 barrels of the identical flour that had been shipped by Prudhomme. They would have taken the 539 barrels which the cartmen of Watts, Crane & Co. took, but the clerk designated those barrels for the use of Watts, Crane & Co., and delivered it to them on an order given by them to the ship for 596 barrels, branded "Nonpareil." The clerk took receipts from Watts, Crane & Co. for the 539 barrels, on such delivery. The evidence clearly shows that the clerk made no discrimination among the barrels, branded, "Nonpareil," but inasmuch as he found on the manifest of the ship 1,596 barrels, marked "Nonpareil," considered that any order for "Nonpareil" flour, whether given by the libellants, or by Watts, Crane & Co., could be properly filled by the delivery of any barrels that were branded "Nonpareil." His attention was called, while delivering the Prudhomme flour on the order of Watts, Crane & Co., to the fact that he was delivering the wrong flour, but he paid no attention to the caution. There is no foundation for the allegation in the answer, that the libellants negligently allowed Watts, Crane & Co. to cart away the 539 barrels.

It is claimed that the clerk was not the agent of the ship, but merely of the consignees of the ship, and that the responsibility of the ship *in rem* ceased after due previous notice to the consignees of the time and place

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The Ship Ben Adams.

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of the unloading of the cargo, the moment the flour was landed over the ship's side upon the dock. This is not so, on the facts of this case. The clerk, as agent of the ship, retained the custody and control of the flour, as and after it reached the wharf, and undertook to deliver it therefrom on orders, not permitting the consignees to interfere with it, except with his consent. The case does not fall within the class of cases where the consignee undertakes to remove the goods from the wharf after they are discharged from the ship, and after the responsibility of the ship in regard to them has ceased. It differs from the case of *Field v. The Lovett Peacock*, decided by this court in April, 1863, and from cases of that character, in the fact that, in the present case, no opportunity was afforded by the ship to the libellants to take possession of, and remove, the 561 barrels shipped by Prudhomme; and the 539 barrels of that flour which were taken by Watts, Crane & Co. remained in the charge, custody, and control of the vessel, until the clerk wrongfully delivered them to Watts, Crane & Co.

The libellants are entitled to a decree for the damages sustained by them by the nondelivery of the 561 barrels of flour shipped by Prudhomme, deducting therefrom the freight, primage, and average specified in the bill of lading for the carriage of the 1,000 barrels, and there must be a reference to a commissioner to ascertain and report the amount for which the decree is to be entered on that basis.

*Beebe, Dean & Donohue*, for the libellants.

*T. C. T. Buckley and J. K. Hill*, for the claimants.

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The Ferry-boat Baltic.

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JUNE, 1868.

## THE FERRY-BOAT BALTIC.

COLLISION AT PIER.—INEVITABLE ACCIDENT.—BURDEN OF PROOF.—  
APPORTIONMENT.

Where a vessel in motion comes in collision with a vessel at anchor, the burden of proof is on the former, to show that the latter was to blame, or that the collision was inevitable.

Inevitable accident, as respects a colliding vessel, means that such vessel has endeavored, by every means in her power, with due care and caution, and a proper display of nautical skill, to prevent the collision.

Where a vessel was lying at the end of a pier which formed one side of a ferry slip, with her stern projecting six or eight feet into the slip, and a ferry-boat coming into the slip was carried by the tide against such vessel:

*Held*, That the collision was not the result of an inevitable accident, as the ferry-boat might have gone further away from the pier ;

That, as the ferry-boat chose to attempt to enter the slip, with the other vessel in the position in which she was, she must take the consequences of the contingency to which she exposed herself ;

That the other vessel was also in fault, in lying with her stern projecting across the entrance to the ferry slip ;

That the damages must be apportioned.

This was a libel for a collision, which occurred on the 2d of October, 1865, about seven o'clock, A. M., between the steam tug Pope Catlin and the steam ferry-boat Baltic. The Baltic was a ferry-boat plying regularly across the East River, at the city of New York, from a slip at the foot of Hamilton avenue, in the city of Brooklyn, to a slip at the foot of Whitehall street, in the city of New York. The collision occurred on a trip of the ferry-boat from Brooklyn to New York. The Pope Catlin was lying with her bow to the westward, motionless, fastened outside of a small schooner, which was lying with her bow to the westward, fastened at the south end of Pier No. 1, East River, which was the next pier westward of the ferry slip on the



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The Ferry-boat Baltic.

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New York side. The Pope Catlin had just towed the schooner to that place from Brooklyn. The ferry-slip had in it two berths for ferry-boats to lie side by side, with a structure of fenders between the two berths, such structure being much shorter than the jaws of the whole slip to the eastward and westward. The tide, at the time, was running strongly ebb, or to the westward, along the piers and the mouth of the slip. Out in the river, it was high water, or perhaps a little flood. The proper navigation of the ferry-boat, with such a tide, was to trend to the eastward, and sag to the westward with the ebb tide, while checking her headway, so as to enter that one of the two berths which was the more westerly, and which was the one for which she was destined. In going in, the port side of the ferry-boat struck the port side of the Pope Catlin, at a point about ten or eleven feet forward of the stern-post of the Pope Catlin, and caused considerable damage to her, by tearing up her deck, and otherwise. The principal part of the damage was shown to have been done by the port wheel of the ferry-boat (she being a side-wheel steamer), in its reverse motion, coming in contact with the tug, while the engine of the ferry-boat was working backward.

The defence set up by the ferry-boat in her answer was, that the stern of the Pope Catlin extended some twelve feet beyond the easterly end of the pier at which she was lying, and the same distance across the entrance to the ferry slip, and in the direct line and track of the ferry ; that the ferry-boat entered her slip slowly and carefully, with her engine reversed, but was carried by the tide against the tug, and was unable to prevent the collision ; and that the collision was solely due to the negligence of the tug, in thus lying across the entrance to the slip.

For libellants, *W. J. Haskett.*

For claimants, *B. D. Silliman.*

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The Ferry-boat Baltic.

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BLATCHFORD, J. Where a vessel in motion comes into collision with a vessel which is motionless, the burden of proof lies on the vessel so coming into collision, to show that the collision was inevitable, or that the motionless vessel was to blame (*The Percival Forster, Lowndes on Collisions*, 58). In the present case, it is claimed, on the part of the ferry-boat, that the force which swept her against the tug was a *vis major*, and that, therefore, the collision was, so far as the ferry-boat was concerned, the result of inevitable accident. The ferry-boat must be held liable for the damages caused by her, while in motion, to the motionless tug, unless she shows affirmatively that her being carried against the tug was the result of inevitable accident, or of a *vis major*, which human care and precaution, and a proper display of nautical skill, could not have prevented (*The Louisiana*, 3 *Wallace*, 164, 173; *The Granite State*, *Id.* 310, 313, 314). Inevitable accident, as respects a colliding vessel, means that such vessel has endeavored, by every means in her power, with due care and caution, and a proper display of nautical skill, to prevent the collision (*The Lochlibo*, 3 *W. Rob.* 310, 318). Within these rules, it is fully established, on the evidence in this case, that, so far as the ferry-boat is concerned, the collision was not the result of inevitable accident, or of a *vis major*. The evidence shows, and indeed it was admitted by the pilot of the ferry-boat, in his testimony, that, as she approached her slip, another ferry-boat was about the length of the Baltic ahead of the Baltic, bound for the easternmost berth in the slip; that the Baltic did not stop for such other ferry-boat, and that, if the Baltic had been alone, and such other ferry-boat had not been thus ahead of her, she would have been able to go nearer to the pier at the easterly side of the slip. The effect of this would have been, that the farther she got to the eastward, the farther would she have kept to the eastward, and away from the tug, when sagged to the west-

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The Ferry-boat Baltic.

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ward by the ebb tide. I am satisfied, from the evidence, that if the ferry-boat had exercised due care, and had kept as far to the eastward as she ought, and as she could but for her crowding too closely upon the ferry-boat ahead of her, she would not have struck the tug. Even if the tug projected with her stern across the entrance to the slip, the ferry-boat, having chosen to attempt to enter her slip with the tug in that position, and under circumstances which made it difficult to escape a collision, must, a collision having taken place, bear the consequences of the contingency to which she exposed herself (*The Hope*, 2 *W. Rob.* 8, 10). If the tug had been wrongfully lying wholly across the entrance to the slip, that would not have exempted the ferry-boat from responsibility for colliding with her in attempting to enter the slip. There was, therefore, fault on the part of the ferry-boat, leading to the collision.

But there was also fault on the part of the tug. The weight of the evidence is, that she was lying with her stern projecting partly across the entrance to the ferry slip, and where she had no right to lie. The character of the blow she received, the place where she was struck, and, indeed, the fact that there was any collision at all, all go to show that she must have been lying with her stern projecting to the eastward of the east end of Pier No. 1.

There must be a decree apportioning equally between the two vessels the damages sustained by the tug by the collision, with a reference to a commissioner to ascertain and report such damages.

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The United States v Flecke.

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JUNE, 1868.

**THE UNITED STATES v. CHRISTOPHER FLECKE,  
JOHN FLECKE AND HENRY HILDEBRAND.****INTERNAL REVENUE.—DISTILLING.—AUTREFOIS ACQUIT.**

Where the defendants had been indicted under the twenty-third section of the Internal Revenue Act of July 13th, 1866, for knowingly carrying on the business of a distiller, on June 22d, 1867, without having paid the special tax, on which indictment they were tried and acquitted, the ground of the acquittal being that they were not the principals who were bound to pay the tax, and were afterward indicted under the twenty-fifth section of the same Act, for knowingly using a still for the purpose of distilling, in a certain dwelling-house, on June 22d, 1867, the evidence on the trial of the first indictment showing that the place of the offence charged was this same dwelling-house :

*Held*, That a plea of *autrefois acquit*, founded on the acquittal under the first indictment, could not be sustained.

That the tests as to whether such a plea can be sustained are, whether the defendants could, under the earlier indictment, have been convicted of the offence embraced in the later one, and whether the evidence necessary to support the later indictment was sufficient to produce a legal conviction on the earlier one.

BLATCHFORD, J. The defendants are indicted by an indictment found April 29th, 1868, under section twenty-five of the Internal Revenue Act of July 13th, 1866, for knowingly using a still for the purpose of distilling, in a certain dwelling-house situated at No. 189 Essex street, in the city of New York, on the 22d of June, 1867. They plead specially a plea of *autrefois acquit*, in this, that they have heretofore been indicted in the Circuit Court for this District, by an indictment found December 23d, 1867, under section twenty-three of the same Act, for knowingly carrying on in this district the business of a distiller, on the 22d of June, 1867, without having paid the special tax in that behalf required by the statutes of the United States, and that they have been

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The United States v. Flecke.

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tried on the indictment first found and acquitted. The earlier indictment specified no place where the business was carried on except this district generally, but it appears that the evidence given on the trial of that indictment showed that the place was the same dwelling-house specified in the later indictment, and that the ground of acquittal was, that the defendants were not principals in the business, and were not properly to be regarded as carrying on the business, and were not the persons bound to pay the special tax, and therefore were not within the twenty-third section. The twenty-third section provides, that if any person shall carry on the business of a distiller, without having paid the special tax as required by law, he shall for every such offence be liable to a fine of not less than double the tax imposed upon the spirits distilled by such person, or found upon the premises where the business is carried on in violation of the section, and to imprisonment for a term not exceeding two years. The twenty-fifth section provides, that no person shall use any still for the purpose of distilling in any dwelling-house, and that every person who shall use such still for the purpose of distilling in any dwelling-house, shall forfeit such still and all the spirits distilled, and pay a fine of one thousand dollars, or be imprisoned for not more than one year, in the discretion of the court.

I do not think there is any thing in the earlier indictment, or in the fact that the defendants were acquitted on it, to prevent their being indicted by the later indictment and being tried under it. The defendants could not, under the earlier indictment, have been convicted of the offence embraced in the later one, nor would the evidence necessary to support the later indictment have been sufficient to produce a legal conviction upon the earlier one. These are the proper tests as to whether the plea of a former conviction or a former acquittal is good or bad, (*Wharton's Criminal Law*, pp. 196

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The Barkantine Kathleen.

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to 199, 2d edition.) Proof on the trial of the earlier indictment, that the defendants used a still for the purpose of distilling in a dwelling-house in Essex street, would not have been sufficient to convict them, under that indictment, of carrying on the business of a distiller, without having paid the special tax required by law; nor would it have been available to convict them, under that indictment, of having used a still for the purpose of distilling in a dwelling-house, because such earlier indictment contained no such charge. The offence created by the twenty-fifth section, is not a minor offence included in the offence created by the twenty-third section, as a greater offence, so as to authorize, on an indictment for the offence created by the twenty-third section, a conviction for that created by the twenty-fifth section.

The plea is, therefore, overruled.

*B. K. Phelps* (Assistant District Attorney), for the United States.

*J. Lux*, for the defendants.

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JUNE, 1868.

## THE BARKANTINE KATHLEEN.

## BOTTOMRY.

Where a British vessel, bound to New York, put into Ship Harbor, Nova Scotia, in distress, and her master, who was half owner, had her repaired, and, having no means to pay for the repairs, borrowed money at Halifax, on a bottomry of the vessel, having telegraphed to the other part owner of the vessel in Canada, but not having been able to procure the funds he needed except by the bottomry:

*Held*, That the master had the right to create a bottomry on his own interest in the vessel, without the existence of any necessity for doing so.

That, as to the interest of his co-owner, it was no objection to the bottomry, that the loan was effected after the repairs were made and the supplies furnished.

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*The Barkantine Kathleen.*

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That, the necessity for the repairs being shown, it was for the claimant to show that the money could have been obtained otherwise than by bottomry, if he would defend against the bond.

This was a libel filed by John Taylor, of Halifax, in Nova Scotia, to recover the amount of a bottomry bond executed at Halifax, on the 3d of June, 1865, by Henry Barthe, master and half owner of the barkantine Kathleen, to the libellant, upon the vessel, to secure the payment of \$3,240 lawful money of Nova Scotia, within ten days after the safe arrival of the vessel at New York, being for \$2,700 lawful money of Nova Scotia, with 20 per cent. premium. The bond recited that Barthe, part owner and master of the vessel, then in prosecution of a voyage from Halifax to Lingan or Cow Bay, in the Island of Cape Breton, and thence to New York, was necessitated to take up, upon the adventure of the vessel, the \$2,700, for setting the vessel to sea, in consequence of her having run on shore at Little Dover, and heavy expenses having been incurred in getting her off and repairing her, and making her fit to continue the voyage, and discharging the lien thereon for said expenses and repairs, and that the libellant had, at the request of Barthe, lent and supplied to him said sum, at the rate of \$120 for every \$100 advanced during said voyage.

The libel averred that the vessel, while on said voyage, in May or June, 1865, ran on shore at Little Dover, and was greatly injured; that she was taken off at considerable expense, and put into Ship Harbor, in the Strait of Canso; that heavy expenses were incurred in getting her off and repairing her, and making her fit to continue the voyage, and in discharging the lien thereon for said expenses and repairs; that Barthe, the master and part owner of the vessel, being a stranger at Halifax, and being in want of money to pay for the repairs of the vessel and fit her for sea, and furnish her with provisions and other supplies necessary for the prosecution of his intended voyage, and having no other means of procu-

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*The Barkantine Kathleen.*

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ring the same, borrowed from the libellant, with the commission thereon, \$3,240, lawful money of Nova Scotia, upon the bottomry of the vessel, and that said sum was advanced and paid accordingly; that the said sum of \$3,240 was advanced and paid by the libellant to the master for said purpose, and was necessary therefor, and that the vessel could not otherwise have sailed from Ship Harbor; and that the vessel arrived at New York on the 19th of July, 1865. The libel was sworn to and filed on the 7th of August, 1865.

The other half owner of the vessel was a person named Lucia, of Sorel, in Canada. A claim by one Charlton, as sole owner, was sworn to and put in by him, on the 14th of August, 1865. He put in an answer to the libel, averring his sole ownership of the vessel on the 27th of September, 1865, when the answer was sworn to by him. His claim and answer averred that he was in possession of the vessel when she was seized. His answer consisted of a general denial of the material allegations of the libel.

The ground taken in defence was, that no necessity was shown for the advance of the money, and that the master did not send to Canada to see if he could procure the money he needed, and that, as the vessel was a British vessel, in a British port, the master belonging in Montreal, the bottomry was not authorized.

For libellant, *Martin & Smith.*

For claimant, *Beebe, Dean & Donohue.*

BLATCHFORD, J. The master had an undoubted right to create a bottomry on his own interest in the vessel, without the existence of any necessity for doing so (1 *Parsons' Mar. Law*, 410, 411, and cases there cited). So far as the interest of his co-owner was concerned, the evidence shows that the repairs, fitments, and supplies were necessary for the vessel; that the money was lent on the



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The Barkantine Kathleen.

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bottomry bond in good faith, for the purpose of paying for those repairs, fitments, and supplies, and the necessary wages of the seamen, and was applied to those purposes; that the debts to which the money was applied were incurred on the credit of the vessel; and that the loan was indispensable to relieve her from the charges. Therefore, it is no objection to a recovery on the bond, that the loan was effected after the repairs and fitments were made and the supplies were furnished (*The Yuba*, 4 *Blatchf. C. C. R.*, 352).

The evidence shows that the master communicated from Halifax by telegraph with his friends in Canada, to see if he could procure the funds he needed, but that he was unable to do so except by resorting to the bottomry. I think that the bottomry was justifiable, although the vessel was a Canadian vessel in the British port of Halifax. No evidence has been introduced on the part of the claimant to show that the money could have been obtained in some other way. The necessity for the repairs and supplies being shown, it is for the claimant to establish such a defence (*The Virgin*, 8 *Peters*, 538, 550). The reasonableness of the maritime rate of interest, 20 per cent., stipulated for by the bond, is sufficiently shown by the evidence.

The libellant is entitled to a decree for the \$2,700 advanced by him, with 20 *per cent.* interest thereon, being in all \$3,240, lawful money of Nova Scotia, with interest thereon at the rate of 7 *per cent.* per annum, from July 29th, 1865, being ten days after the vessel arrived at New York.

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In the Matter of Isaac Seckendorf, a Bankrupt.

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JUNE, 1868.

**IN THE MATTER OF ISAAC SECKENDORF, A  
BANKRUPT.****ADJOURNMENT.—EXAMINATION OF BANKRUPT.**

Where an order was obtained for the examination of a bankrupt and his wife, proceedings on which order were adjourned several times, during which time the bankrupt filed a petition for discharge, and obtained an order to show cause, but nothing was done on the return day of that order, but objections were afterward filed, and thereupon, on the day to which the examination had been adjourned, the bankrupt objected to being examined, on the ground that he had applied for his discharge, and the time to file objections to the discharge had expired:

*Held*, That the adjournment, without day, of the proceedings under the petition for discharge, terminated those proceedings, unless a new order was issued.

That the objections to the discharge might stand as properly filed.

That the time to examine witnesses had not expired.

That the time to file objections should be kept open by adjournments of any order to show cause, until a full opportunity for the examination of the bankrupt and his wife, and other witnesses, had been given.

In this case, the petition of the bankrupt was filed on November 21st, 1867. On March 3d, 1868, a creditor, who had proved his claim, obtained an order for the examination of the bankrupt and his wife. Proceedings were adjourned on that order, by consent, without examination, on several occasions, till May 26th. On March 18th, the bankrupt, on his petition for discharge, obtained an order to show cause, &c., returnable April 20th, but on the return day nothing was done. On May 15th, the examining creditor filed notice of appearance in opposition to the discharge, and on the 19th of May he filed objections to the discharge. On May 26th, the day to which the examination was adjourned, another attorney appeared for the bankrupt, and objected to the examination of the bankrupt and his wife, first, because the time to examine the bankrupt

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The Steamboat Jack Jewett.

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had expired, the bankrupt having applied for his discharge; and, second, because the time to file objections to the discharge had expired. The register overruled the objections, and certified the question to the Court.

BLATCHFORD, J. The adjournment without day, on the 20th of April, of the proceedings under the petition for discharge, terminated those proceedings, so far as any action under the order to show cause against the petition was concerned. The petition for discharge remains good, but nothing can be done under it, unless a new order to show cause is issued. The creditor who filed the objections to the discharge was not called upon to file them when he did, but they may stand as properly filed under the petition for discharge. All the creditors who shall have proved their debts will have a new day for filing objection, under the new order to show cause. The time to examine witnesses has not expired, and the time to file objections to the discharge should be kept open by adjourning any day which may be fixed for showing cause against a discharge, until a full, reasonable opportunity is afforded for the examination of the bankrupt and his wife, and other witnesses, if such examination is desired.

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JUNE, 1868.

## THE STEAMBOAT JACK JEWETT.

SALVAGE.—FIRE.—QUANTUM MERUIT.—PARTIES.—COSTS.

Where a tow-boat, while towing a vessel, saw another vessel on fire at a wharf, and went to her, and, with a steam-pump, helped to put the fire out, being delayed in all from three to four hours, and, about six weeks afterward, without any notice to the owner of the vessel saved, the owner of the tow-boat filed a libel for himself alone, claiming a salvage of seventy-five *per cent.* of the value of the vessel saved:

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The Steamboat Jack Jewett.

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*Held*, That, as the owner of the tow-boat was not personally present at the service, there could be no award of salvage remuneration to him; but, as owner, he was entitled to an equitable compensation for the use of his vessel.

That, as the usual compensation for her services in towing was \$10 an hour, and as she gave the use of her steam-pump, the sum of \$150 was sufficient compensation.

That, under the circumstances, the award would be without costs.

BLATCHFORD, J. This is a libel for salvage, filed by the owner of the steamboat Gamecock, a vessel engaged in the business of towing, against the steamboat Jack Jewett. The Gamecock, while on a trip from New Haven to New York, between one and two o'clock A. M., on the 14th of October, 1866, towing a vessel, discovered the Jack Jewett on fire, lying at a wharf at Riker's Island. The libel avers that the fire had driven the crew of the Jack Jewett from her; that she was abandoned by her officers and crew; and that, under those circumstances, she was about being destroyed, when the Gamecock, with her crew, went to the assistance of the Jack Jewett, and by the exertions of such crew, and the use of the steamboat and her pump, the fire was put out, and the vessel saved in a damaged state, when otherwise she would have been totally destroyed. The libel claims that the libellant is entitled to salvage to the amount of seventy-five *per cent.* of the value of the saved property, which is averred to be \$4,500. The answer sets up that, at the time of the fire, the Jack Jewett was moored at the wharf at Riker's Island; that, after she had been burning over two hours, and all her joiner-work had been destroyed, and nothing was left of her, except her hull and water tanks, and the flames had so subsided that her crew had been enabled to return to her, and were engaged in extinguishing the fire in her timbers and hull, the Gamecock came up, and, against the will and remonstrance of the master and persons in charge of the Jack Jewett, threw some water, through a small hose, upon the hull and timbers of the Jack Jewett; that such services were of no real benefit to

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The Steamboat Jack Jewett.

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her; that all that was saved of her would have been saved, without the aid or services of the Gamecock; that nothing was saved except the hull, which was in a damaged condition; that all lien for salvage was lost, because the libellant left the Jack Jewett in the possession of the claimant; and that this court has no jurisdiction of this suit, because it is brought for services rendered to a vessel while she was moored at a wharf, and not while she was employed on the high seas.

The libellant is not entitled to recover as a salvor in this case. He was not personally engaged in the service. The libel is not filed on behalf of those who were personally engaged in the service. It is filed solely on behalf of the libellant, as owner of the Gamecock, for salvage compensation to him as such owner. There can, therefore, be no award of salvage remuneration in this case (*The Charlotte*, 3 *W. Rob.*, 68, 72). But the libellant, as owner of the vessel which rendered the assistance, and which was diverted for a time from her proper employment, is entitled to an equitable compensation for the use of his vessel (*The Charlotte*, *above cited*). The Gamecock was engaged in pumping water on the Jack Jewett for nearly two hours, and was delayed in all not over from three to four hours, when she resumed her voyage. It is shown that the value of her time, in towing, is ten dollars an hour. This rate of compensation, so far as the libellant, as owner of the boat, is concerned, covers the time of the boat, and the value to him of the services of her officers and crew. In addition to the service which the Jack Jewett would have received, if the Gamecock had been towing her, the Jack Jewett had the benefit of the use of the steam-pump of the Gamecock, to throw the water. Something should be allowed for this. I think an aggregate compensation of \$150 to the libellant is sufficient.

It is in evidence, that the owner of the Jack Jewett never heard of the claim for salvage till the libel was filed,

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In the Matter of Louisa Hirschberg, a Bankrupt.

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which was about six weeks after the fire, and after a settlement had been made by him with the insurance companies who had insurances on the vessel, and after he had commenced to rebuild her. In view of this, and of the unconscionable amount demanded for salvage in the libel, in a case which is not a case of salvage at all, I shall not allow costs to the libellant. A decree will be entered accordingly.

*Beebe, Dean & Donohue*, for the libellant.

*J. K. Hill*, for the claimant.

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JUNE, 1868.

IN THE MATTER OF LOUISA HIRSCHBERG, A  
BANKRUPT.

ATTORNEY'S COSTS UNDER SECTION TWENTY-EIGHT OF THE BANKRUPTCY  
ACT.

Where attorneys of a voluntary bankrupt presented and proved a claim for legal services in preparing the petition and schedules, and advice in relation to it, and for disbursements:

*Held*, That no part of it was a debt to be paid in full, under the twenty-eighth section of the bankruptcy Act.

In this case, a voluntary bankrupt had inserted in her schedule, A, No. 1, as a debt to be paid in full, according to the twenty-eighth section of the bankruptcy Act, a charge of her attorneys for \$250, "for legal services in preparing the petition and schedules, and advice in relation thereto," the attorneys' disbursements being over \$100. The creditors and the assignee objected to the allowance, and the register certified the question to the Court.

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In the Matter of Alexander Frear, a Bankrupt.

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BLATCHFORD, J. I do not think that the claim in question, or any part of it, even to the extent of the disbursements embraced in it, is a claim to be paid in full, under section twenty-eight of the Act. The fees, costs, and expenses, named in the first of the five subdivisions, in section twenty-eight, are those incurred by, and due to, the register, clerk, assignee, and marshal, and not those incurred by the bankrupt, or due to his attorney in the proceedings, for services or disbursements in connection with such proceedings.

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JUNE, 1868.

IN THE MATTER OF ALEXANDER FREAR, A  
BANKRUPT.

INDIVIDUAL PETITION.—PARTNERSHIP DEBT.

Copartnership debts may be proved in proceedings instituted by a single partner, on an individual petition, whether there are any assets of the copartnership or not.

The bankrupt, in this case, filed his individual petition, which made no reference to copartnership debts, but the schedules attached showed that he was a member of a firm which had dissolved more than six months before the filing of the petition, and contained a number of debts of such firm. One of such creditors offered proof of his debt against the firm. The bankrupt objected to the proving of the debt because it was a firm debt. The register held the debt to be provable, and certified the question to the Court.

BLATCHFORD, J. The debt in question is provable, whether there are any assets of the copartnership or not. If there are any such assets, they must be administered

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In the Matter of William K. Belcher, a Bankrupt.

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according to the provisions of section thirty-six, of the bankruptcy Act, and so must the assets of the separate estate of the bankrupt.

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JUNE, 1868.

IN THE MATTER OF WILLIAM K. BELCHER,  
A BANKRUPT.

PLACE OF FILING PETITION.

Where a merchant, who had resided in New York city for more than twenty years, failed in business, sold his residence in that city, and removed his family to New Jersey, and they thereafter resided there upon some property belonging to his wife, while he engaged as a clerk with his successors in business, and continued so till the filing of his petition in bankruptcy, two years after:  
*Held*, That his petition was properly filed in the Southern District of New York.

The petition in this case was filed on February 19th, 1868, setting forth that the petitioner had done business, and had a place of business, in the Southern District of New York, for more than six months next immediately preceding such filing. The petitioner had carried on business, and resided in New York city for more than twenty years before June, 1866, when he failed in business, and made a general assignment, sold his residence, and removed his family to New Jersey, where they thereafter resided upon some property belonging to his wife. He himself at once engaged, as a clerk, upon a salary, with his successors in business, and so continued till his petition was filed.

On these facts the question whether the petition was properly filed in this Court was submitted to the register, who held that it was properly filed, and this decision of the register was sustained by the court.



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In the Matter of Edward Bigelow, and others, Involuntary Bankrupts.

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JUNE, 1868.

**IN THE MATTER OF EDWARD BIGELOW, DAVID BIGELOW, AND NATHAN KELLOGG, COMPOSING THE FIRM OF E. & D. BIGELOW, INVOLUNTARY BANKRUPTS.**

**LIEN OF CREDITOR.—BANK STOCK.**

Where bankrupts, at the time of the adjudication in bankruptcy, were indebted to a bank, in which they severally owned stock, and the by-laws of the bank provided that the stock of stockholders should be liable for their debts to the bank:

*Held*, That the bank had a lien upon the stock, and had the right to apply it toward such indebtedness, whether it was an indebtedness of the bankrupt firm, or of the individual stockholders.

The bankrupts in this case were adjudged to be such on the petition of a creditor, on November 16th, 1867. On that day David Bigelow and Nathan Kellogg were indebted, as also was the firm, to the First National Bank of Saugerties, in large amounts, and Bigelow and Kellogg each owned twenty shares of stock in the bank, of which they had been directors from its foundation. The bank claimed a lien upon the stock, and refused to transfer it to the assignee in bankruptcy. It claimed this lien under the by-laws of the bank, adopted on July 11th, 1865, in pursuance of a clause in the articles of association, which gave the directors power to make by-laws, "which by-laws may prohibit, if the directors shall so determine, the transfer of stock owned by any stockholder, who may be liable to this association, either as principal debtor or otherwise, without the consent of the bank." The by-laws adopted contained the following clauses: "ART. 4.—SEC. 3. This association shall not, under any pretence, loan money on a pledge of shares of the capital stock of the association. But this shall not

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In the Matter of Edward Bigelow, and others, Involuntary Bankrupts.

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be so construed as to prevent the association from applying the shares of any individual shareholder, in manner hereinafter named, toward the payment of a *bona fide* debt, which such shareholder may owe to the association.

SEC. 4. The association, and the board of directors hereinafter mentioned, shall have power (whenever any shareholders thereof shall owe a debt then due to the association, and which shall have been due and unpaid for the space of three months), to give notice to such shareholder, that if such debt be not paid and satisfied at the expiration of ten days from the time of such notice, the shares of the capital stock of this association, held by such shareholder, or standing in his name, or so much thereof as may be necessary, will be sold in satisfaction of such debt; and if, at the expiration of said ten days, the said debt of such shareholder shall remain due and unpaid, the board of directors hereinafter mentioned shall have full power and authority to proceed and sell the shares held by such shareholder, or such part thereof as shall be sufficient to pay such indebtedness, either at the board of brokers in the city of New York or at public auction in the village of Ulster, and to appropriate the proceeds of the sale, if of sufficient amount, in satisfaction of such debt, and if not of sufficient amount to pay the whole debt, then toward and on account of such indebtedness.

SEC. 5. No shareholder of this association shall be permitted to transfer his share, or receive a dividend or interest thereon, who shall owe to the association a debt, which shall have become due and have remained for the space of one day unpaid, until such debt be paid, unless by and with the consent of the board of directors of the association hereinafter mentioned; and any transfer made contrary to the provisions of this article, shall be null and void.

ART. 5.—SEC. 1. The board of directors shall cause suitable books to be kept for the registry and transfer of the shares of the association, and every transfer, to be valid, shall be made

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In the Matter of Edward Bigelow, and others, Involuntary Bankrupts.

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in such books, and signed by the shareholder, or his attorney, duly and specially authorized thereunto in writing. SEC. 2. No shares shall be transferred on which any call for an installment of capital, or any interest on such installment, shall remain unpaid. SEC. 3. Every transfer shall be made and taken, expressly subject to all the conditions and stipulations contained in these articles. Every person becoming a shareholder by such transfer, shall, in proportion to his shares, succeed to all the rights and liabilities of prior shareholders. SEC. 4. The board of directors may close the transfer books at any time, for a period not exceeding ten days, as the convenience of the association may require." As the bank claimed this lien upon the stock, the bank and the assignee agreed upon a statement of facts raising an issue of law, which the register adjourned into court, giving it as his opinion that the lien of the bank was terminated by non-action on the part of the bank to enforce it, and by the appointment of an assignee in bankruptcy.

BLATCHFORD, J. I think the bank has a lien upon the stock so held by Kellogg and Bigelow, and has the right to apply the same toward the payment of the indebtedness to the bank which was due on the 16th of November, 1867, as well the individual indebtedness as the copartnership indebtedness.

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The Steamer Ariadne.

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JUNE, 1868.

## THE STEAMER ARIADNE.

COLLISION OFF BARNEGAT.—STEAMER AND BRIG.—LIGHTS.—SPEED.—  
BURDEN OF PROOF.

Where a brig, sailing westward, at night, and keeping her course, was struck on her starboard quarter by a steamer running south by west quarter west, at the rate of about seven or eight knots an hour, the steamer having kept a good lookout, and having, as soon as the brig was seen, no light being visible, stopped and backed her engine, and having, as soon as the course of the brig was seen, put her helm hard a starboard:

*Held*, That, on the evidence, the brig did not have burning such a green light as could be seen at the distance of two miles, and that this fault contributed to the collision;

That the burden was on the libellants, the owners of the brig, to establish that the steamer was in fault;

That it was not shown that the steamer could have seen the brig sooner;

That the speed of the steamer was not too great, as she had the right to rely on the exhibition of a light by an approaching vessel;

That the steamer was not in fault, and the libel must be dismissed.\*

THIS was a libel for a collision, which took place about 11 o'clock P. M., on the 13th of December, 1865, between the brig William Edwards and the steamer Ariadne. The brig was bound from Havre to New York. The steamer was a propeller, bound from New York to Appalachicola. The brig had taken a pilot, and was about twelve miles from Barnegat, and about eight miles off shore. The libel averred that the brig saw the steamer approaching, at a distance of three miles off; that the brig was at the time close-hauled to the wind, and had all her lights displayed; that she kept steadily on her course, but the steamer continued to approach her and struck her starboard quarter, causing her to sink and be totally lost. The damage claimed was over \$60,000.

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\* This decision was affirmed by the Circuit Court, in May, 1870.

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The Steamer *Ariadne*.

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The answer set up that the night was cloudy and dark; that the wind was from north to north-northeast, a strong whole-sail breeze; that the steamer had her lights properly set and burning, and a competent lookout properly stationed and vigilant; that the steamer had no sails set, and was going from seven to eight knots an hour, heading south by west quarter west, Barnegat light bearing about southwest half south; that the brig was discovered near to the steamer, a little on her port bow, no lights being visible on the brig, and heading towards the shore across the steamer's bows; that the steamer's bells were immediately rung to stop and back, and her wheel was put hard to starboard so as to make her go under the stern of the brig, but, although her engine was immediately stopped and reversed, and her helm was put hard to starboard as quickly as possible, yet, by reason of the proximity of the vessels, it was impossible to clear the brig; that the green light on the starboard side of the brig had gone out, or burned so low and dimly, or had so smoked the glass of the lantern, that it was not visible; and that the brig could not have been seen sooner than she was.

For libellants, *J. E. Parsons* and *T. Scudder*.

For claimants, *E. H. Owen*, and *C. Donohue*.

BLATCHFORD, J. I think the weight of the evidence is, that the brig did not have burning, at the time of the collision, such a green starboard light as the statute requires—a light capable of being seen on a dark night, with a clear atmosphere, at a distance of at least two miles. The night was dark, but not foggy, though cloudy, and the evidence is that the light of a vessel could have been seen that night two miles. No green light on the brig could be seen from the steamer, and the evidence from on board the brig, that her green light was

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The Steamer *Ariadne*.

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burning at the time so as to be visible, beyond a very short distance, is very unsatisfactory. There had been trouble with both of the side lights of the brig that night, and they had required to be taken down and retrimmed. If the green light had been properly burning, it would have been seen from the steamer, at a sufficient distance to have left the brig wholly blameless, and the steamer wholly in fault, for the collision. This fault on the part of the brig undoubtedly led to the collision.

In any view, the burden is on the libellants to show that the steamer was in fault. But, as the brig did not have a green light properly burning, it is especially incumbent on them to show, that, notwithstanding such condition of their own light, the collision arose from the fault of the steamer. The libellants fail to show this. They do not show that the steamer could, with proper vigilance, have seen the brig in season to avoid her. The speed of the steamer was not too great, in view of the character of the night, there being no fog, and she having a right to rely on the exhibition of a light by an approaching vessel, for the reason that a proper light, if exhibited, could be seen at a distance sufficiently great to avoid a collision. The steamer had a lookout properly stationed, competent and attentive, and it is not made out that the brig could have been seen sooner than she was. She loomed up out of the darkness, but, because her green light could not be seen, her course could not be discerned, and the evidence is, that the steamer was promptly slowed and stopped and backed, and, that when the master of the steamer, by the aid of his night-glass, made out the course of the brig, the helm of the steamer was put to starboard, which turned her head to the eastward, and was a proper manœuvre, as the brig was headed to the westward.

The libel must be dismissed, with costs.

JUNE, 1868.

**THE STEAMBOAT AMERICA AND THE STEAM-  
BOAT NEW HAVEN.****COLLISION IN HUDSON RIVER.—TOWBOAT.—KEEPING TO THE RIGHT.**

Where a steamboat was coming down the Hudson river, having boats in tow on each side, and having lights properly set, and kept close to the west bank of the channel, and, seeing the lights of an approaching tow, slowed and stopped, and the tug-boat coming up was also on the west side of the channel, and, seeing the other's lights, hauled out to the eastward, and then straightened up the river, and a collision occurred between one of the boats which she was towing astern, and the boat on the port side of the steamboat coming down:

*Held*, That there was no fault on the part of the boat that was injured;

That the steamboat going up was in fault in not keeping to the east side of the channel, and that she either did not sheer far enough to the eastward, or straightened up the river too soon;

That the steamboat coming down was not shown to be in fault.

THIS was a libel for a collision which occurred about six o'clock P.M., on the 25th of October, 1865, after dark, on the Hudson river, about seven miles below Albany, between the lake boat or barge Contest and a boat in tow of the steamboat America, whereby the Contest was badly damaged. The amount of damages claimed was \$10,000. The Contest was one of seventeen boats, all of which were in tow astern of the steamboat New Haven, fastened in tiers by hawsers, there being five tiers, the boats in each tier being abreast of each other, and the Contest being the extreme port boat in the third or the fourth tier of boats, there being four boats in that tier. The New Haven was bound, with her tows, from New York to West Troy. The America was on her way down the river from Albany, with two boats lashed side by side to her starboard side, and two to her port side, and some others astern, all in tow. The port bow of the extreme

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The Steamboat America and The Steamboat New Haven.

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port boat, on the port side of the America, struck the port side of the Contest about amidships, tearing off her chine plank, and cutting through her timbers, and causing her to leak badly, and injuring her cargo. The libel charged negligence on the part of both the America and the New Haven.

The answer of the America set up, that when the lights of the New Haven were seen from the America, at the distance of from a mile to a mile and a half, the America, with her tows, hauled close in to the westward, and near to a stone dike which forms the western bank of the river for a considerable distance; that the New Haven, still coming on pretty well in to the westward, the America was slowed; that the New Haven then sheered out to the eastward, far enough to herself clear the most easterly boat on the port side of the America, and, in so doing, disclosed to the view of the America the boats towed astern of the New Haven; that the engine of the America was then stopped, and was shortly after backed, as soon as there appeared to be danger of a collision, and was backing, when a boat or boats astern of the New Haven, on the port side, were dragged across the bow of the extreme boat on the port side of the America, by the New Haven, which, after sheering out to the eastward, straightened up the river so close to the extreme boat on the port side of the America, as herself to pass within ten to fifteen feet, or nearer, off the port side of said boat; that, at the time of the collision, the extreme boat on the starboard side of the America was within about twenty feet of the dike on the west side of the river, and as far to the westward as it was safe for her to be, and the America had backed so that the boats towed astern of her were close upon her; that there was abundant time and room for the New Haven, with her tow, to have passed to the eastward of the America and her tow, and she ought to have passed so far to the eastward with her tow as to avoid all danger of a collision;



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The Steamboat America and The Steamboat New Haven.

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that she did not do this, nor did she slow or stop before the collision; that the tide was flood, but not running strong; and that the collision was not the fault of the America.

The answer of the New Haven contained no statement of the particulars of the collision, or of the grounds assumed by the New Haven in defence. It consisted of a denial of all the material allegations of the libel, and of an averment that the New Haven was carefully navigated, and that the collision took place in consequence of the individual fault, or combined fault, of the Contest and the America, and was the fault of the agents and servants of the libellants, and not of the claimant.

*Spencer, Hoes & Metcalf*, for the libellants.

*C. Van Santvoord*, for the America.

*Beebe, Dean & Donohue*, for the New Haven.

BLATCHFORD, J. There is no evidence showing any fault on the part of the Contest. The testimony is, however, satisfactory to show that the New Haven was in fault. She was violating the statute law of New York (1 R. S., part 1, chap. 20, tit. 10, sec. 1), which required her to keep to the right or easterly side of the channel. Her pilot, Kane, who was at the wheel at the time of the collision, states that he was going along the dike till he got above the dam, and that he then sheered to the eastward, on seeing the America approach, till he got clear of the America's tow, and then straightened up the river. But either he did not soon enough sheer to the eastward, or else he straightened up too soon, after sheering. That the New Haven dragged the Contest into contact with, and across the bow of the boat lashed to the America, is shown by the fact, that the boats in front of the Contest, as well as she herself, and the boat

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In the Matter of Ely Hoppock, a Bankrupt.

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behind her, struck against the boat lashed to the America, although none of them were injured to the extent that the Contest was. The theory on the part of the New Haven, that the America took a sheer to the eastward when the two steamboats were abreast of each other, is not supported by the evidence. The America came down as near to the dike as it was safe for her to go, and, if any thing, she sheered to the westward rather than the eastward, when she saw the near approach of the New Haven. She had a right to suppose that the New Haven would keep to the right of the channel, and would sheer out to the eastward in season, the lights of the America being plainly visible. Her speed was moderate, and she was slowed and stopped and backed promptly, and her forward motion was stopped at the time of the collision, whereas the New Haven and her tows were under headway at that time. No fault is shown on the part of the America.

The libel must be dismissed as to the America, with costs, and the New Haven must be condemned in damages and costs, with a reference to a commissioner, to ascertain the damages caused to the libellants by the collision.

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JUNE, 1868.

IN THE MATTER OF ELY HOPPOCK, A  
BANKRUPT.

INVOLUNTARY BANKRUPTCY.—TRIAL.—ORDER OF PROOF.—LEGAL  
PROCESS.

Where a petition in involuntary bankruptcy alleged that the bankrupt had concealed himself, to avoid the service of legal process, &c., as provided in the 39th section of the bankruptcy Act, and the debtor demanded a trial by jury: *Held*, That, on such trial, notwithstanding the provisions of the 41st section of the bankruptcy Act, the creditor was called upon to prove the facts alleged in his petition.

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Fifty-one Bales of Goats' Hair.

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That an order for the examination of the debtor in proceedings supplemental to execution, under § 292 of the New York Code, was "legal process," within the meaning of the thirty-ninth section of the bankruptcy Act.

THIS was a petition in involuntary bankruptcy, presented by Richard S. Brock against Ely Hoppock. The ground of bankruptcy alleged, was that the debtor had concealed himself to avoid the service of legal process in an action for the recovery of a debt or demand, provable under the Act, as provided in the thirty-ninth section of the bankruptcy Act.

The debtor appeared by counsel, and demanded a trial by jury. On such trial the question of the order of proof arose, under the forty-first section of the Act, which provides that "if, upon such hearing or trial, the debtor proves to the satisfaction of the court or of the jury, as the case may be, that the facts set forth in the petition are not true," the proceedings shall be dismissed.

The court held that the petitioner was called upon to prove the facts alleged in his petition.

In the course of the evidence it appeared, that, judgment having been rendered against the debtor and an execution returned unsatisfied, orders in proceedings supplementary to execution, under § 292 of the Code of New York, had been issued and attempted to be served.

The court held that such orders were "legal process," within the thirty-ninth section of the bankruptcy Act.

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JUNE, 1868.

## FIFTY-ONE BALES OF GOATS' HAIR.

## REVENUE ACT OF 1861.—GOATS' HAIR.

Under the twenty-third section of the tariff Act of March 2d, 1861 (12 *U. S. Stat. at Large*, 193, 195), goats' hair, uncleaned and unmanufactured, is exempt from

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In the Matter of Edward Bigelow, and others, Bankrupts.

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duty, notwithstanding the provisions of the fourth section of the Act of June 30th, 1864 (13 *Id.* 206).

THIS was an application, on the part of the collector of the port of New York, for an order directing the payment, out of the proceeds of the property above-named, which had been sold as perishable, of duties on the goods. The suit was brought to forfeit the goods to the United States, by reason of fraud in the entry, and the duties were claimed under the fourth section of the tariff Act of June 30th, 1864 (13 *U. S. Stat. at Large*, 206).

BLATOHFORD, J. The prayer of the petition is denied. I think that the twenty-third section of the Act of March 2d, 1861, (12 *U. S. Stat. at Large*, 193, 195) exempting from duty hair of all kinds, uncleaned and unmanufactured, applies to the goats' hair in question, which is uncleaned and unmanufactured, and that such section is in force, notwithstanding any thing in the Act of June 30th, 1864. The fourth section of that Act is merely a substitute for the twelfth section of the Act of March 2d, 1861, and is not repugnant to any thing in the provision, in regard to hair, in the twenty-third section of the Act of 1861. The hair in question was exempt from duty.

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JUNE, 1868.

IN THE MATTER OF EDWARD BIGELOW, DAVID  
BIGELOW, AND NATHAN KELLOGG, BANK-  
RUPTS.

APPLICATION TO SELL COLLATERALS.—PREVIOUS PROOF OF DEBT  
NECESSARY.

Where, in bankruptcy proceedings, a creditor, claiming to hold collaterals as security for an indebtedness of the bankrupts, applied for an order to sell the

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same, under the twentieth section of the bankruptcy Act, which was opposed by the assignee in bankruptcy on the ground that the creditor had not proved his debt, as required by the twenty-second section of the Act :

*Held*, That the creditor could substantiate his claim against the bankrupts, so far as to comply with the requirements of the twenty-second section, without previously ascertaining the value of the securities which he held.

That, as the creditor's right to hold the collaterals was dependent upon his ability to show himself to be a creditor, no permission to sell the collaterals could be granted, until his right to sell them was shown, as required by the twenty-second section of the Act.

BENEDICT, J. This is an application, on the part of the National Bank of the Commonwealth, for an order directing the sale by the bank of certain stocks belonging to the above-named bankrupts, which the bank claims to hold as security for the indebtedness of the bankrupts to the bank.

The application is founded upon a petition setting forth that the bank is a creditor of the bankrupts to the extent of \$31,880, as security for which it holds certain stocks pledged by the bankrupts, the value of which is uncertain, and as to which value the assignee in bankruptcy declines to agree ; and the petitioners therefore pray for an order to sell said stocks, in accordance with the provisions of the twentieth section of the bankruptcy Act, which declares that "when a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt, after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the Court shall direct."

The application is strenuously opposed by the assignee in bankruptcy, principally upon the ground that it is premature, inasmuch as the petitioners have taken no steps whatever to exhibit or prove their debt in the manner required by the twenty-second section of the bankruptcy Act.

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The question thus raised I have considered with some care, because of the very positive opinion expressed by the intelligent counsel for the petitioners, that, if the application of the petitioners be now denied, it will be impossible for them to make proof of their debt without by that act releasing their right to the securities which they claim to hold.

This opinion, I am satisfied, by an examination of the various provisions of the bankruptcy Act, is erroneous; and I am also satisfied that, in the present posture of the proceedings, the application of the petitioners cannot be granted.

According to the plain words of the very provision of the twentieth section which gives power to make the order here prayed for, the right to the order is made to depend upon certain facts, namely: the existence of a debt owing to the creditor from the bankrupt, by virtue of which the creditor is to be admitted to share in the distribution of the bankrupt's estate, and the existence in the hands of the creditor of securities pledged by the bankrupt to secure the payment of that debt.

How these facts shall be made to appear, is not provided in the twentieth section, but is provided in the twenty-second section. According to the twenty-second section, any creditor desiring to be admitted to share in the estate of the bankrupt by virtue of a debt owing him from the bankrupt, must exhibit his claim in a deposition, setting forth the consideration thereof and the securities, if any, held therefor. Upon this deposition a hearing may be had, and testimony offered both in support of and in opposition to the averments of the deposition; and an adjudication is to be thereon made. But it will be noticed that the value of the securities which may appear to be held by the creditor is not required by the Act to be set forth in the deposition, and that Form twenty-one only requires an estimate of that value to be made. The value of the securities forms no

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part of the issue which the deposition tenders, nor is it a fact of any importance to be known until it shall appear that there is a valid indebtedness, and that such property is held as security therefor.

These facts having been made to appear, and it being thus determined that the person claiming to be a creditor is in fact entitled to share in the distribution of the estate, it then becomes necessary to ascertain the value of the property of the bankrupt which the creditor is entitled to hold, in order, by charging that value against the indebtedness shown to exist, to fix the amount which is to be allowed as the creditor's debt, for which he is entitled to be admitted to share in the distribution of the assets.

The mode of ascertaining this value is given in the portion of the twentieth section above cited, and when this value has thus been ascertained and deducted from the indebtedness proved, then the debt of the creditor is proved within the meaning of the twentieth section.

As used in that section, the word "debt" means the amount upon which the dividend is to be computed, and the phrase, "prove his debt," is equivalent to the phrase, "share in the distribution of the assets."

A creditor does not prove as against the estate, or offer to so prove, the whole indebtedness of the bankrupt exhibited in his deposition, when against that indebtedness are set out securities held therefor, the value of which, when ascertained, the court is asked to deduct from the indebtedness, in order to arrive at the balance of the account, for which balance alone the creditor seeks to be admitted to share in the distribution of the assets; and I fail to find any provision in the bankruptcy Act which declares that the exhibition of such a deposition, and proving the facts which it avers, if it be contested, will invalidate the right of the creditor to the securities which he is found to hold.

But it is said that the twentieth section declares that

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if the security be not sold or released, the creditor shall not be allowed to prove any portion of his debt, and therefore that the sale asked for is a necessary precedent to any attempt to exhibit a claim to be a creditor. I have above stated that this clause does not, in my opinion, refer to the exhibition of the claim required by the twenty-second section, but refers to the right of the creditor to have his debt placed on the list as entitled to draw a dividend. But, if this be not so, it is by no means certain that the clause is applicable to any case but one where the value of the property exceeds the sum for which it is held as security, which is not the case here; and, besides, if the clause be applicable to this case, it certainly does not declare that if the creditor does prove his debt, he shall lose his security. And, inasmuch as, in this case, the assignee, who is the only person opposing, insists that the petitioners can and must prove their debt, it would seem that the clause could be no impediment to the petitioners.

My conclusion, therefore, is that the petitioners can exhibit and substantiate their claim against these bankrupts so far as to comply with the requirements of the twenty-second section, without previously ascertaining the value of the securities which they hold, and that inasmuch as their rights to the proceeds of the stocks, which they concede to be the property of the bankrupts, is dependent upon their ability to show themselves to be creditors, and to hold this property as security, no permission should be granted them to sell the property until their right to do so is shown in the manner required by the twenty-second section of the Act. To grant that permission now would be to assume the existence of facts which may never be made to appear, for it cannot now be shown that the petitioners will ever seek to participate in the proceedings in bankruptcy; or, if they do, that upon the hearing it will be adjudged that they have any debt, or, if they have, that these stocks were pledged



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In the Matter of Patrick Purcell and Henry M. Robinson, Bankrupts.

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to them as security therefor; and what title would be conveyed by a sale made under such circumstances, in the event of its being adjudged, in the bankrupt proceedings, that the petitioners were not creditors of the bankrupts, or that they did not hold these stocks of the bankrupt as security for any debt?

To grant that permission would be to assume as proved the facts upon which the right to the order is, by the Act, made dependent, and yet make the order for the sole reason that these same facts have not been, and cannot now be, proved.

I must confess my inability to see how such action can be properly required of the court.

The motion is therefore denied.

*James Emott and E. H. Pomeroy*, for motion.

*P. Cantine*, opposed.

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JULY, 1868.

## IN THE MATTER OF PATRICK PURCELL AND HENRY M. ROBINSON, BANKRUPTS.

### SALE BY ASSIGNEE OF MORTGAGED PROPERTY.

Where an assignee in bankruptcy, on taking possession of the personal property of the bankrupt, found that a portion of it was subject to a chattel mortgage, but sold it all without objection from the mortgagee, and the property mortgaged did not sell for the amount of the mortgage:

*Held*, That the mortgagee was not thereby entitled to be paid the full amount of his mortgage, as a privileged debt.

In this case the register certified to the court that a certain portion of the bankrupt's property delivered to the assignee was personal property, which was covered

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All the Distilled Spirits, &c., found at the Distillery of England & Evans.

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by a chattel mortgage; that the assignee had sold all the property; that the mortgaged property did not at such sale realize the amount of the mortgage; that the holder of the mortgage claimed that the assignee should pay the amount of the mortgage in full, as a privileged debt, making up the deficiency out of the proceeds of the other property; but that the register had held that such claim could not be allowed.

BLATCHFORD, J. Understanding the question certified by the register to be, whether the assignee shall make up, out of the general funds of the estate, any difference between the net proceeds of the sale of the mortgaged property, and the amount stated by the mortgage to be due, I answer it in the negative.

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JULY, 1868.

## ALL THE DISTILLED SPIRITS, &c., FOUND AT THE DISTILLERY OF ENGLAND & EVANS.

### INTERNAL REVENUE.—FORFEITURE—MORTGAGOR AND MORTGAGEE.

Where property was seized as forfeited for an alleged violation of the Internal Revenue Law, and, in the suit brought to enforce the forfeiture, a motion had been made to bond the property, which had been denied, and thereupon a mortgagee intervened, and made an application on his own behalf to bond the property:

*Held*, That the mortgagee stood in no better position, in relation to the alleged forfeiture, than the mortgagor.

That it was the thing itself which was forfeited by the statute in question, and not the right, title, and interest of the mortgagor.

That the motion must, therefore, be denied.

THIS was a motion made by Archer & Brother, as claimants, to be allowed to bond certain property in the custody of the marshal under the process

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All the Distilled Spirits, &c., found at the Distillery of England & Evans.

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in this case. The property was under seizure for alleged violations of the Internal Revenue Laws of the United States. Archer & Brother had intervened and filed a claim and answer, claiming, as mortgagees, the possession of a part of the property so seized. Their claim was founded on a chattel mortgage, executed to them, November 20th, 1866, to secure a debt previously contracted, and conditioned for the payment thereof in four months from that date. The seizure was made February 3d, 1868, for a forfeiture incurred subsequently to the giving of the mortgage. The information was filed February 6th, 1868.

A motion had been previously made, on the part of the mortgagors, or parties holding under them, as claimants in the case, to bond the same property, which motion was denied by the court.

For the motion, *D. McMahon*.

In opposition, *E. Allen (Assistant District Attorney)*.

BLATCHFORD, J.—The ground on which the present motion is urged is, that, as the mortgage to Archer & Brother was made in good faith, as security for a debt incurred for merchandise sold to the mortgagors by the mortgagees before the forfeiture was incurred, and as there is no collusion between the mortgagees and the parties concerned in the acts out of which the forfeiture arose, and as the mortgagees did not participate in such acts, the lien of the mortgage is superior to the claim of the United States under the forfeiture, and the latter cannot override the former. It is insisted that nothing more is forfeited to the United States than the right of property of the offender who violates the law, in the property mortgaged, and that the United States take the property subject to the lien of the mortgage. I cannot assent to this view. By the various sections of the In-

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ternal Revenue Act that are counted on in the information, it is the offending thing that is forfeited, the entire right of property of all the world in the thing is cut off, the proceeding is *in rem*, and it is not the right of property therein of the mortgagor, any more than the right of the mortgagee, that is cut off. The thing is the offender, and the mortgagee, by suffering the thing to be in such a position that the offence can be committed in respect of it, is just as much, in a legal sense, a participant in the offence, so far as the thing is concerned, as the mortgagor, who actively uses the thing to commit the offence.

The mortgagees in this case stand, therefore, in the same position as the mortgagors, and as those who hold under the mortgagors, so far as this motion is concerned. Nothing is shown to vary the facts on which the court denied the previous motion to bond. The present motion is, therefore, denied.

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JULY, 1868.

IN THE MATTER OF MARSHALL L. DUNHAM  
AND JOSEPH ORR, INVOLUNTARY BANK-  
RUPTS.

MORTGAGE BY SOLVENT DEBTOR.—REVENUE STAMP.—PLEADING.

Where a firm executed a mortgage upon personal property in their store, to secure a debt due to one of their creditors, which mortgage was executed November 1st, 1867, and filed November 26th, 1867, and on the 2d of January, 1868, the mortgage was foreclosed and the property sold, the mortgagors having failed in business in December, 1867, and it was not alleged in the petition in involuntary bankruptcy, which was filed against the firm, that they were, when the mortgage was given, bankrupt or insolvent or then contemplated bankruptcy or insolvency:

*Held*, That, though the mortgage was not given for a present consideration, within the fourteenth section of the bankruptcy Act, and although it was made with

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the intent to give a preference to a creditor, it was not made with intent "to delay, defraud, or hinder" the creditors of the mortgagors, within the meaning of the thirty-ninth section of that Act.

Where, in support of an allegation that an act of bankruptcy had been committed by the transfer of certain property by the debtors, when bankrupt or insolvent, with intent to prefer a creditor, an assignment of the property in question was offered in evidence, which had no Internal Revenue stamp upon it, and which was the only proof offered:

*Held*, That, under the one hundred and fifty-eighth section of the Internal Revenue Act of June 30th, 1864 (13 *U. S. Stat. at Large*, p. 292), the assignment was void, and the allegation of the petition in bankruptcy was not sustained.

In proceedings in involuntary bankruptcy, no replication is necessary to the denial by the debtors, according to Form No. 61, of the allegations of the petition.

BLATCHFORD, J. The petition in this case alleges two acts of bankruptcy: (1.) That the debtors, on or about the first of November, 1867, being possessed of certain estate, property, rights, or credits, to wit, a stock of millinery goods, consisting of feathers, flowers, and numerous other articles, together with the lease, fixtures, and furniture of the premises known as number 334 Canal street, in the city of New York, made a sale, conveyance, or transfer of the same to one Robert Orr, of said city, with intent to delay, hinder, and defraud the creditors of the said debtors; (2.) That the debtors, on or about the            day of January, 1868, being bankrupt or insolvent, made to the said Robert Orr an assignment, conveyance, or transfer of certain property, rights, and credits, to wit, the book accounts, claims, demands, and debts due or to become due to the said debtors, with intent to give a preference to said Robert Orr, he being or claiming to be a creditor of the said debtors, or with the intent, by such disposition of their property, to defeat, delay, or hinder the operation of the bankruptcy Act.

The debtors have denied the acts of bankruptcy set forth in the petition, and testimony has been taken on the issues thus raised.

An objection is taken on the part of the debtors, that,

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as no replication has been filed by the petitioners to the answer of the debtors, the answer must be taken as true, and the proceedings must be dismissed. The answer is merely the form of denial contained in Form No. 61, and states that the debtors deny that they have committed the acts of bankruptcy set forth in the petition, and aver that they should not be declared bankrupt for any cause in the petition alleged. Such an answer sufficiently raises an issue as to the acts of bankruptcy alleged in the petition. It amounts to the general issue, and no replication is necessary. The objection is, therefore, overruled.

The first act of bankruptcy alleged is founded on that clause of the thirty-ninth section of the Act which provides, that if a debtor shall make a sale, conveyance, or transfer of his estate, property, rights or credits, with intent to delay, defraud, or hinder his creditors, he shall be deemed to have committed an act of bankruptcy. It is not an element of this act of bankruptcy that the debtor shall be, at the time of committing it, bankrupt or insolvent, or be contemplating bankruptcy or insolvency, nor is any allegation to that effect made in the petition, in connection with the first alleged act of bankruptcy.

The testimony in support of the first act of bankruptcy alleged shows that the debtors, on the first of November, 1867, executed and delivered to Robert Orr a chattel mortgage on "six bunches of flowers, and all other the stock in trade, fixtures, lease, and furniture, and all other goods and chattels mentioned" in a schedule annexed to the mortgage, and then "in the store and premises No. 334 Canal street, in the city of New York" (the schedule specifying the lease of the premises, and sundry flowers, straw goods, feathers, and the fixtures and furniture in the store), to secure the payment of the sum of five thousand dollars on demand, with interest thereon from the date of the mortgage to

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the time of payment; being (as the mortgage states) "the amount of my promissory note bearing even date herewith, this mortgage being given as collateral security thereto." This mortgage was filed on the 26th day of November, 1867, in the proper office to make it a valid mortgage under the laws of New York, in the absence of an actual and continued change of possession of the mortgaged property. The evidence shows, that the debtors commenced business in January, 1867, and failed the last of December, 1867; that the mortgage was given at the suggestion of Robert Orr, to secure a debt of \$5,000 due by the debtors to Robert Orr, and evidenced by a note or notes of the debtors for that amount, held by Robert Orr; that the value of the mortgaged property, at the time the mortgage was given, was between \$2,000 and \$3,000; that the mortgage covered all the property of the debtors, except their book accounts; and that the debtors continued business, and remained in possession of the mortgaged property, after the mortgage was given, until the 2d of January, 1868, when Robert Orr foreclosed the mortgage, and a sale was had of the mortgaged property. It is not shown affirmatively that the debtors were insolvent at any time prior to the last of December, when they failed. Under these circumstances, although the mortgage was not given for a present consideration, within the provision of section fourteen of the Act, still it was a mortgage on personal property of the debtors, held by the creditor, Robert Orr, for securing the payment of a debt owing to him from the bankrupt, and thus within the saving clause of section twenty of the Act; and, it not being alleged in the petition, or shown by the evidence, that the mortgage was given when the debtors were bankrupt or insolvent, or contemplated bankruptcy or insolvency, it cannot, although it was made with the intent to give a preference to Robert Orr as a creditor, be held to be within any of the inhibitions of the thirty-ninth section of the

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Act, or to have been made with intent to "delay, defraud, or hinder" the creditors of the mortgagors, within the meaning of those terms as used in that section. There is nothing to impeach the *bona fides* of the debt due to Robert Orr, and, to hold that these debtors, when not bankrupt or insolvent, or contemplating bankruptcy or insolvency, had no right to secure that debt by a chattel mortgage so long as they owed other debts, and that the giving of such mortgage is to be taken as evidence of an intent to delay, defraud, or hinder the creditors of the mortgagors, and is to be regarded as forbidden by the thirty-ninth section of the Act, would render invalid all chattel mortgages by solvent debtors. There certainly was no intent to delay, defraud, or hinder Robert Orr as a creditor. The inhibition is against the hindering, delaying, or defrauding by the debtor of "his creditors," that is, all his creditors, as a body, generally. The only inhibition against giving a preference to a creditor by a mortgage is found in a subsequent clause in the thirty-ninth section, which is confined to the case where the debtor so giving the preference is bankrupt or insolvent, or is contemplating bankruptcy or insolvency. The first act of bankruptcy alleged is, therefore, not sustained.

As to the second alleged act of bankruptcy, the only evidence to sustain it is an instrument in writing, signed by the debtors, dated December 28th, 1867, purporting to transfer to Robert Orr, in order to secure the indebtedness of the debtors to him, sundry accounts against sundry persons named in the transfer, and amounting to \$2,593.98. This instrument has no Internal Revenue stamp upon it. It ought to have had upon it a stamp of at least five cents, as an agreement or contract, under Schedule B following section 170 of the Internal Revenue Act of June 30th, 1864, as amended. By section 158 of that Act, every instrument not stamped according to law is declared to be invalid and of no effect. Not



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only did the petitioning creditors, on the hearing, claim that this instrument was void for want of the proper stamp, but the debtors also insisted that it was void for the same reason. It was and is void for that reason, and the second alleged act of bankruptcy is, therefore, unsustained by proof.

The proceedings are, therefore, dismissed, with costs to the respondents.

*Thomas McGovern*, for the petitioning creditors.

*L. J. Lansing*, for the respondents.

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## Eastern District of New York.

JULY, 1868.

### IN THE MATTER OF FRANCIS A. HIRSCH, A BANKRUPT.

#### INJUNCTION.—ATTACHMENT.—JURISDICTION.

Where, previous to the passage of the bankruptcy Act, an attachment had been issued out of the Supreme Court of the State of New York against the property of H, who made a motion to set aside the attachment, which was denied, and he appealed from the order denying his motion to the general term of the court, but the plaintiffs in the suit in the meantime proceeded to judgment and execution, under which funds levied on under the attachment had been paid to the sheriff and by him paid to the judgment creditor, so that, at the time of the passage of the bankruptcy Act, no proceeding was pending in that suit except the appeal from the order above mentioned, and thereafter the judgment debtor filed his petition in bankruptcy and obtained an order from the Bankruptcy Court that the creditors show cause why they should not be restrained from enforcing their claim, with a stay of proceedings meantime, and before the order to show cause was returnable, the appeal in the State Court above referred to, was called in its order and dismissed by the plaintiffs' attorney, he having had notice of the stay

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granted by the Bankruptcy Court, and a motion was thereupon made for an attachment against the judgment creditor and his attorney for disobedience of the stay:

*Held*, that as that appeal, if successful, would not have affected the judgment which had been recovered against the bankrupt, or replace the money which had been paid to the creditor, or give the assignee in bankruptcy any right which he would not otherwise possess, the dismissal of the appeal could not be said to be a violation of the order of this court forbidding proceedings to enforce the plaintiffs' claim.

Whether a Bankruptcy Court has power to enforce the protection of the bankrupt against suits pending outside of the district, and brought by parties residing and being outside of the district, or how obedience to its orders is to be enforced outside of the district, *Quere?*

THIS was a motion for an attachment against George Kretz, and Titus Eldridge his attorney, for a contempt, in disregarding an order of this court made in the above-mentioned bankrupt proceedings. The facts were as follows: The petition of the bankrupt was filed in the Eastern District of New York on the 22d day of May, 1868, and, upon the same day, the petitioner was declared a bankrupt. The proceedings in bankruptcy thereupon proceeded and were still pending, the bankrupt not having as yet received his discharge, and no assignee having as yet been appointed. Prior to any of these proceedings, and prior to the passage of the bankruptcy Act, George Kretz and a Dupont Davis had commenced an action against the bankrupt in the Supreme Court of the State of New York, and obtained an attachment against his property, by virtue of which a certain amount of money in the Bank of America, in the City of New York, had been attached. A motion was thereupon made in behalf of the bankrupt, in the State Court, to set aside the attachment, which motion, at the time of the commencement of the bankruptcy proceedings, was pending before the general term of the Supreme Court, in the City of New York, upon an appeal taken by the bankrupt from an order denying the motion to set aside the attachment. The bankrupt thereupon applied to this court for an injunction to restrain further proceedings in the action in the

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State Court and obtained an order directing the plaintiffs in that action to show cause, before this court, why all proceedings on the part of the said creditors to enforce the payment of their said claim, either by proceedings in the action aforesaid or otherwise, should not be stayed to await the determination of this court in bankruptcy on the question of the discharge of said bankrupt, and that, meanwhile, all proceedings of said plaintiffs to enforce the payment of their claim be stayed. Before the return day of this order, it happened that the appeal was called in its order upon the calendar of the State Court, and was then dismissed by the plaintiffs' attorneys after notice of the stay granted by this court. This motion was made for an attachment against the creditors and their attorney for a contempt of this court in violating the stay.

BENEDICT, J. The difficulties surrounding this proceeding, which were suggested to counsel upon the original application, and which impelled me to issue an order to show cause, with a stay meanwhile, instead of a peremptory injunction, have not been removed by the argument which has been had. There is certainly difficulty in holding that any provision of the bankruptcy Act confers upon this court the power to issue an injunction which shall run into all the States in the Union, and be effective to stay proceedings which may be pending against the bankrupt in any court of any State. According to the theory of the Judiciary Act, the jurisdiction of the District Courts is limited to their respective districts. According to the theory of the various laws relating to the Federal judiciary, the jurisdiction of the District Courts is limited to their respective districts. The jurisdiction conferred upon these courts by the bankruptcy Act is indeed an extended one, for the proper exercise of which it would seem necessary, in certain cases, that the orders of the bankruptcy court should run

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throughout the United States; but it is certainly difficult to affirm that this extended power has been conferred by any of the provisions in the Bankrupt Law. If, however, it can be held that this power is necessary to the exercise of the jurisdiction expressly conferred, and therefore to be implied, and that when the bankrupt has surrendered all his property to a District Court, before which alone his proceedings in bankruptcy can be considered to be pending, he has the right to look to that court for the protection against suits, pending the adjudication upon his petition, which the Act expressly declares that he shall have, and which it is not easy to see that any other court can grant, and that every creditor of the bankrupt, wherever he may be, is a party to the proceedings under the petition, and therefore subject to the orders of that court, whether served in or out of the judicial district in which the petition was filed, still another difficulty arises in regard to the method of enforcing obedience to such orders by parties residing and being out of the judicial district, which is the present case. If an attachment be issued, to whom shall it be directed? I find no authority conferred upon this court to issue process to the marshal of any other district, directing him to arrest those persons and bring them before this court. In criminal cases, the practice in regard to delinquents out of the district is regulated by the 33d section of the Judiciary Act (1 *Stat. p.* 91), where it is provided that, for any crime or offence against the United States, the offender may be arrested wherever he may be found; and, if such arrest is within a district other than that in which the offence is to be tried, the judge of the district where the delinquent is arrested issues his warrant to the marshal of his district, directing the removal of the delinquent to the district where the trial is to be had. It might be that upon an attachment for contempt being ordered, the proceedings could be considered as thenceforth a criminal proceeding, and

so the offender brought before the judge of the district where the arrest might be made, and then transferred to this court under the provisions of the Judiciary Act. But if not, then I do not see how this Court can do more than issue its writ to the marshal of the district, to be executed only within this district. Such a proceeding, however, in this, as in most cases, would be entirely futile and unavailing as a means of enforcing the orders of the Court, for the offenders do not reside in the district, and there is no evidence that they can ever be found therein. These difficulties I am not, however, required to solve in the present case by means of the facts shown upon the return of the order to show cause, for it appears that prior to the commencement of the action in the State Court, the bankrupt had, by a general assignment, transferred all his property to an assignee for the benefit of his creditors. The money in the Bank of America would therefore pass to this assignee, if not bound by the attachment which was subsequently issued upon the commencement of the action in the State Court, and would in no event pass to the assignee in bankruptcy when appointed. The action of the State Court, moreover, as it now appears, had proceeded to judgment before the passage of the bankruptcy Act, and the money attached in the bank had been paid to the sheriff, and by him paid to the plaintiffs upon the judgment and execution issued thereon, so that at the time of the commencement of the bankruptcy proceedings the only proceeding pending in the State Court was an appeal taken by the bankrupt from an order denying a motion to set aside the attachment, and this appeal, if successful, would in no way affect the judgment which has been recovered in this action, nor would it retake from the plaintiffs the money received from the bank, nor would it give the assignee in bankruptcy any right which he would not otherwise possess. It therefore seems clear that no action of the plaintiffs in

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The Steam Ferry-boat Warren.

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regard to this appeal would tend to enforce any demand against the bankrupt, nor deprive the assignee in bankruptcy of any property or right. When, therefore, the appeal being called upon the calendar for argument, the plaintiffs dismissed it for want of prosecution, the counsel for the bankrupt being present and not desiring to proceed, they cannot be said to have disobeyed the order of this court, which forbade all proceedings to enforce their said claim. The motion must, therefore, be denied.

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JULY, 1868.

## THE STEAM FERRY-BOAT WARREN.

## COLLISION.—PLEADING.—COSTS.

Where a libel for a collision failed to convey any idea of the manner in which the collision took place, but was not excepted to, and on the hearing a decree was made dismissing it:

*Held*, That no costs would be given, because the libel should have been excepted to and dismissed.

BENEDICT, J. The libel in this case is filed to recover the sum of \$250, being the damages alleged to have been sustained by the steamer Utah, in two collisions with the ferry-boat Warren. It is meager in its details, and fails entirely to convey any idea of the manner in which either collision took place. It sets forth none of the movements of either vessel on either occasion, makes no allusion to the causes of either accident, and fails to state the nature or amount of injury sustained on each occasion. The only fact, tending to describe either accident, which is stated, is that the Utah was on each occasion leaving her pier in the East

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The Steam Ferry-boat Warren.

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River. This fact is contradicted by the only witness called by the libellant, who states that the first collision was in the morning, when the Utah was coming in, and the second in the afternoon, when she was leaving her pier. This witness, as to the first collision, says it was of little account, and the pilot and deck hand of the ferry-boat testify that they never knew of any such occurrence. As to the second collision, the witness is more particular, but I cannot believe he describes it with accuracy. It seems to me to be highly improbable that any such accident as this witness describes could have occurred. This single witness, called by the libellant, is positively contradicted by two witnesses from the ferry-boat, who, while they admit that the ferry-boat touched the Utah one day as she went out, deny *in toto* the story of the libellant's witness, and aver that the slight accident that did occur was caused by the backing of the Utah, and after the ferry-boat had fairly entered her slip, and had dropped her pin. Furthermore, while the libel is filed to recover \$250 as the amount of damage sustained, it is shown that at the time the damages were stated to be only \$31, and a bill for that amount was rendered. In such a state of the pleadings and proofs, no decree can be rendered in favor of the libellants. The libel must therefore be dismissed. I withhold costs, however, for the reason that a libel so entirely insufficient upon its face, according to well-established decisions should have been expected to, and thus dismissed.

*L. B. Bunnell*, for libellants.

*Beebe, Dean & Donohue*, for claimants.

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The Steamship Nebraska.

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JULY, 1868.

## THE STEAMSHIP NEBRASKA.

## COLLISION.—VESSEL LYING AT A PIER.

Where a steamship was coming into Pier 37, in the East River, in the harbor of New York, in tow of a tug, and, by the order of the pilot of the steamship, a movement of the tug was made which caused the steamship to swing against a schooner lying at the end of Pier 39, so as to crush in a canal boat which lay between the schooner and the end of that pier:

*Held*, That it was the duty of the steamship to come in at Pier 37 so as to avoid touching the vessels at Pier 39, and that she was responsible for the damage.

BENEDICT, J. These are two actions, which were tried together, brought by the owners of the canal-boat Sarah Ball, and the owners of certain cargo on board that boat, to recover the damages sustained by the respective libellants in a collision which occurred at Pier No. 39, in this harbor, on the 20th day of November, 1867. There is little or no dispute as to the facts, which are as follows: The canal-boat lay at the end of Pier No. 39, inside of a schooner, being there engaged in delivering her cargo of coal. The place was a proper place for her to lie; she was properly moored, and the evidence fails to show any fault on her part conducing to the accident which ensued. The steamer was bound to Pier No. 37, in tow of a tug upon a hawser. When she was turning in the river, and as she was passing the pier at which the canal-boat and schooner lay, the tide being flood, an order was given by the pilot of the steamer to the tug, which had stopped her engine for a short time, to go ahead. Thereupon the tug started up, and by her action hauled the bow of the steamer somewhat into the river, thereby causing the steamer's stern



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The Steamship Nebraska.

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to swing in shore, and thereby the steamer's starboard quarter, as she passed, came down upon the schooner with force enough to crush the canal-boat inside. The only question discussed by the claimant was, whether the tug should not be the party held liable, inasmuch as her action caused the steamer to swing in upon the vessels at the pier. But the evidence fails to show that the tug disobeyed any order given by the persons in charge of the steamer, under whose direction she was, while it does appear that, as the steamer was handled, she would, without the action of the tug, have touched the schooner, although it may be that she would in that case done no damage. It was the duty of the steamer, having full control of herself and of the tug, to come into her pier, No. 37, in such a way as to avoid touching the vessels at Pier No. 39. The evidence fails to show any excuse for not doing so; and it is evident that the master of the steamer did not consider the action of the tug to have been such as to excuse the steamer, from the fact which he himself states, that after the accident occurred, he went round to the schooner, inquired as to the damage done to her, and sent a man to repair it. This fact, together with the further circumstances that the answer does not allude to any fault or action of the tug as a cause of the collision, are decisive of the case. The decree must be for libellants, with an order of reference to ascertain the amount.

*Benedict & Benedict*, for libellants.

*Owen, Nash & Gray*, for claimants.

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In the Matter of William S. Cone & William M. Morgan, Involuntary Bankrupts.

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## Southern District of New York.

AUGUST, 1868.

### IN THE MATTER OF WILLIAM S. CONE AND WILLIAM M. MORGAN, INVOLUNTARY BANK- RUPTS.

#### PLEADING IN BANKRUPTCY.—FRAUDULENTLY STOPPING PAYMENT.

Where a petition in involuntary bankruptcy alleged as an act of bankruptcy that the debtors had "fraudulently stopped and suspended, and not resumed payment of their commercial paper for a period of fourteen days," but no facts were stated in the petition or in the affidavit which accompanied it, to show that such stoppage, &c., were fraudulent:

*Held*, That no order to show cause could be issued.

THIS was an application for an order to show cause why the debtors should not be adjudged bankrupts. The petition was filed by Wright Gillies and James M. Gillies, and alleged that they were creditors of William S. Cone and William M. Morgan, and that in April last said Cone & Morgan made in their favor a promissory note, payable in two months, for \$618.19; that at the time said note became due, payment was demanded and refused; and that within six months before the filing of the petition, the said Cone & Morgan suspended payment of their commercial paper for a period of fourteen days.

BLATCHFORD, J. The petition merely states a legal conclusion that the debtors "have fraudulently stopped and suspended, and not resumed payment of their commercial paper, for a period of fourteen days." This is stated substantially in the language of the thirty-ninth

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In the Matter of Julius L. Adams, a Bankrupt.

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section. The affidavit to sustain the allegations of the petition merely states the same legal conclusion. The stoppage and non-resumption are sufficiently shown, but no facts are set forth to judicially satisfy the Court that such stoppage and non-resumption were fraudulent. Mere stoppage and non-resumption for fourteen days are not sufficient, nor is fraud inferable therefrom. The order to show cause is refused.

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SEPTEMBER, 1868.

## IN THE MATTER OF JULIUS L. ADAMS, A BANKRUPT.

### APPLICATION FOR EXAMINATION OF BANKRUPT.

Where an application was made to a register verbally, by a creditor who had proved his debt, for an order for the examination of the bankrupt, and was not supported by petition or affidavit, and the register held that the application was insufficient:

*Held*, That such application ought to have been made on petition or affidavit, duly verified, showing good cause for the granting of the order.

In this case, a creditor, who had duly proved his claim, applied to the register for an order for the examination of the bankrupt, under section twenty-six of the bankruptcy Act. The application was made verbally, and was unsupported either by petition or affidavit. The register held that the application was insufficient, and on request certified the question to the Court.

BLATCHFORD, J. The creditor, in the present case, to obtain an order according to Form No. 45, for the examination of the bankrupt under section twenty-six of the Act, must apply for such order by petition or

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In the Matter of Doris Housberger and Gustav Zibelin, Bankrupts.

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affidavit, duly verified, and show good cause for the granting of the order.

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SEPTEMBER, 1868.

IN THE MATTER OF DORIS HOUSBERGER AND  
GUSTAV ZIBELIN, BANKRUPTS.

DATE WHEN ASSIGNMENT IN BANKRUPTCY TAKES EFFECT.—SHERIFF'S  
FEES ON AN ATTACHMENT ISSUED PREVIOUS TO BANKRUPTCY PRO-  
CEEDINGS.

Where an attachment was issued to a sheriff on June 8th, under which he seized on that day goods of the debtors, and they, on June 10th, filed their petition in bankruptcy, and on June 19th the register demanded of the sheriff the goods which he had attached, which he refused to deliver up, and, on September 1st, an assignee was appointed, who also demanded the goods, and the sheriff claimed to hold them for his fees, of which he presented a bill, and the assignee requested the register to sanction its payment, which he refused to do:

*Held*, That the assignment in bankruptcy dissolved the attachment;

That such assignment dated back to the 10th of June, and the title of the assignee to the property vested in him as of that date, but subject to all liens then existing;

That the proceedings of the sheriff, up to June 10th, were regular and valid, and he had a lien on the property for fees which had then accrued, but to no greater extent.

In this case, the petition in bankruptcy was filed on June 10th, 1868. On June 19th, the register applied to the sheriff of the city and county of New York for the delivery of certain goods which he had seized on June 8th, under an attachment against the property of Housberger & Zibelin, which he had received on that day. The sheriff refused to deliver up the goods. An assignee was appointed September 1st, and having also demanded the goods of the sheriff, was presented with

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In the Matter of Doris Housberger and Gustav Zibelin, Bankrupts.

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a bill for sheriff's fees, and the sheriff refused to deliver up the goods until such bill was paid. The assignee applied to the register to sanction the payment of the bill, which he refused to do, but certified the question to the court.

BLATCHFORD, J. The attachment must be assumed to have been properly issued on the 8th of June. It was legal and valid until it was dissolved. It was dissolved on the 10th of June. The assignment which dissolved it related back to the commencement of the proceedings in bankruptcy (sec. 14). The filing of the petition on the 10th of June, followed by an order of adjudication, was the commencement of proceedings (sec. 38). The attachment was, therefore, dissolved by the assignment as of the 10th of June. The title to the property attached vested in the assignee as of the 10th of June, but it so vested subject to all subsisting liens then existing on the property. The attachment was not vacated or made void *ab initio*. It was only dissolved from and after June 10th. The proceedings of the sheriff under it, up to June 10th, were regular and valid, and I think he has a lien on the property, for his fees which accrued prior to the filing of the petition, but to no greater extent.

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In the Matter of George J. G. Davidson, a Bankrupt.

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## Eastern District of New York.

SEPTEMBER, 1868.

### IN THE MATTER OF GEORGE J. G. DAVIDSON, A BANKRUPT.

CONFLICT OF JURISDICTION.—TITLE TO PROPERTY.—PRACTICE.

Where property had been levied on by a sheriff as the property of D., and was duly taken from his possession in a suit of claim and delivery brought in a State Court by other parties who claimed to own it, and who gave the usual undertaking for its return, if such return was adjudged, and in due course of such suit it was delivered to the plaintiffs, and a warrant in bankruptcy having been issued in proceedings against D., the marshal, under such warrant, took the property from the plaintiffs' possession and delivered it to the assignee in bankruptcy, and they applied on affidavits for an order directing the assignee to deliver it back to them :

*Held*, That the case was not one of any conflict between the marshal and the officers of the State Court ;

That the remedy of the parties was by a suit against the marshal or the assignee, or by bill in equity or petition ;

That the motion must be denied, but that the assignee should make no disposal of the property for ten days, to enable the parties to take proceedings to protect themselves.

THIS was a motion for an order directing the assignee in bankruptcy to surrender the possession of certain coal, held by him as part of the property of one George J. G. Davidson, a bankrupt. It appeared from the papers that the coal in question, when in possession of Davidson, was levied on by the sheriff, by virtue of an execution against Davidson. Subsequently it was taken from the possession of the sheriff by the coroner, by virtue of proceedings for claim and delivery instituted in the Supreme Court of the State by the parties now moving, who were the original owners of the coal, and who

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In the Matter of George J. G. Davidson, a Bankrupt.

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insisted that the title to the coal never passed from them to Davidson for the reason that he obtained possession by reason of fraudulent representation. At the time the coroner took possession of the property, he received from the plaintiffs in replevin an undertaking, as required by the statute, for the return of the property, if return thereof should be adjudged, and for the payment of such sum as might, for any cause, be recovered against the plaintiffs. And no return of the property having been required by the defendant in that action, as might have been done under the statute, the property was delivered by the coroner to the plaintiffs in replevin, from whom it was, however, taken by the marshal of the United States, by virtue of a warrant in bankruptcy, issued out of this court against Davidson. Subsequently, the marshal delivered the property to the assignee in bankruptcy, who held the same as property of the bankrupt, and claimed title thereto by virtue of the assignment in bankruptcy. Upon such a state of facts, the plaintiffs in replevin moved the court, upon affidavits, for a summary order, directing the assignee to deliver them the property.

BENEDICT, J. The facts presented in these papers do not make out a case of conflict between the marshal and the officers of the State Court as to the possession of the property in question; nor do they require the interference of the court by its summary order to avoid a conflict of jurisdiction. This property has not been taken by the marshal from the officers of any court, but from private persons, who claim to be the owners of it. No interference with the process of the State Court, by any officer of this court, is shown, and no officer of the State Court makes application to this court for protection. The remedy of these parties, therefore, is not by an application like the present, but by an action at law against the marshal or the assignee; or, perhaps, by a

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In the Matter of Oscar H. Clough, a Bankrupt.

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bill in equity, where all the rights of all parties could be passed on and determined; or by a petition in accordance with the suggestion made by the Supreme Court, in *Buck v. Colberth*, in 3 Wall., p. 347. It might be that the present proceeding could, without injustice, be treated as such petition; but I forbear to do so, in order to give these parties opportunity to indicate, by a formal petition, a clear intention to submit the question of their title in this property to the determination of the court.

The motion is therefore denied, but the assignee will forbear to make any disposal of the property for the space of ten days, unless by consent of the parties here moving, to enable them to take such proceedings to protect their rights as they may be advised.

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## Southern District of New York.

OCTOBER, 1868.

### IN THE MATTER OF OSCAR H. CLOUGH, A BANKRUPT.

#### PROOF OF DEBT.—UNLIQUIDATED DAMAGES.

Where a proof of debt was filed, the debt being for unliquidated damages, and the creditor made no application to have the amount fixed by an assessment, and the bankrupt objected that the debt was not duly proved:

*Held*, That the objection was well taken, and that the Court was not called on to order an assessment of damages, unless the creditor applied for it.

THIS case came up on an objection by the bankrupt to the proof of a debt. At the time the proof was filed, the creditor was notified by the register that, as the debt was for unliquidated damages, its amount should



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In the Matter of John S. Wright, a Bankrupt.

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be fixed by an assessment, but he made no application for an order for such an assessment, expressing himself satisfied to let it remain as it was. Whereupon the bankrupt objected to the reception of the proof of debt, on the ground that the debt was not "duly proved." The register sustained the objection, and held that the proof of debt could not stand as filed, and that the Court was not called on to order an assessment, unless the creditor applied for it.

The question was certified to the Court, which decided that the decision of the register was correct.

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OCTOBER, 1868.

## IN THE MATTER OF JOHN S. WRIGHT, A BANKRUPT.

### EXAMINATION OF BANKRUPT AS TO FRAUD IN CONTRACTING A DEBT.— EFFECT OF DISCHARGE.

Where creditors had filed proof of debt in a bankruptcy proceeding, alleging that the debt was contracted by fraud, and, on the examination of the bankrupt, proposed to inquire as to the facts constituting the alleged fraud:

*Held*, That the inquiry was irrelevant;

That a debt fraudulently contracted is not discharged by a discharge in bankruptcy, and that the question whether such discharge affects a debt can only be raised and determined in a suit to collect the debt, in which the discharge shall have been set up as a bar to the recovery;

That section twenty-one of the bankruptcy Act does not apply to debts which, by section thirty-three, are excepted from the operation of a discharge.

IN this case, creditors had proved a debt against the bankrupt, the proof of debt alleging that the same was fraudulently contracted. An order for the examination of the bankrupt was made on their application, and, on such examination, they proposed to prove by him the

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In the Matter of John S. Wright, a Bankrupt.

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nature of the transaction out of which the debt arose, and to show that it was fraudulently contracted.

The bankrupt objected, and the register sustained the objection, and certified the question to the Court.

For the creditor, *Weeks & Forster*.

For the bankrupt, *Chapman, Scott & Crowell*.

BLATCHFORD, J. The creditors, Knowles & Forster, cannot be allowed to examine the bankrupt, to prove the nature of the transaction out of which the indebtedness due to them arose, and that such indebtedness was created by the false and fraudulent representations of the bankrupt and his late partnership, for the purpose of showing that the debt cannot be discharged under the proceedings in bankruptcy. The examination proposed is wholly irrelevant. The question of fraud in the creation of the debt cannot be litigated in these proceedings. A debt which is, by section thirty-three of the Act, excepted from the operation of a discharge, as is a debt created by the fraud of the bankrupt, can be collected notwithstanding the discharge. The question whether the discharge affects the debt in question can only arise and be determined between the parties in a suit prosecuted to collect the debt, in which the discharge, after it shall have been granted, shall be pleaded or set up as a bar to a recovery. There is nothing in the proof of debt in this case which can in any manner conclude or prejudice either party in any suit pending in any other tribunal, so far as regards the issue of fraud in the contracting of the debt. The creditors cannot be prejudiced by proving their debt, if it was in fact a debt created by fraud, for section thirty-three of the Act expressly saves all their rights, even though they prove their debt. Nor, *e converso*, can any thing in the proof of debt affect or conclude the bankrupt

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The Schooner Arlington.

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on any issue as to the creation of the debt by fraud. Section twenty-one of the Act, in so far as it declares that a creditor who proves his debt shall be deemed to have waived thereby all right of action and suit against the bankrupt, and that all proceedings already commenced, or unsatisfied judgments already obtained thereon, shall be deemed to be discharged and surrendered thereby, cannot be held to apply to or include a debt which is by section thirty-three excepted from the operation of a discharge; otherwise, sections twenty-one and thirty-three would be directly repugnant to each other, and while section thirty-three declares that such a debt shall not be discharged under the Act, even though the creditor proves it, the creditor would, by section twenty-one, be deprived forever of bringing any suit against the bankrupt to recover the debt, and would be held to have discharged any unsatisfied judgment for it already obtained. The provision referred to in section twenty-one applies only to a debt which will be discharged by a discharge.

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OCTOBER, 1868.

## THE SCHOONER ARLINGTON.

## SALVAGE.—TOWAGE.—TENDER.—COSTS.

Where a libel, claiming \$1,000 as salvage, for service rendered by a steam-tug in towing a schooner away from a ship where there was a fire, was filed by the owner of the tug, who was not personally present when the service was rendered:

*Held*, That the case was not one of salvage, but that the libellant was entitled to reasonable compensation for the use of his vessel.

It appearing that the service occupied but two or three hours, that another vessel was towed out at the same time, that the steam-tug was not diverted from

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The Schooner Arlington.

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any other occupation, that her usual compensation was from \$10 to \$15 an hour, and that the master of the schooner had refused to pay more than \$50 :

*Held*, That that sum was sufficient, and that the libellants should recover that sum without costs. That, if the \$50 had been tendered or brought into Court the Court would have awarded costs to the claimants.

BLATCHFORD, J. This is a libel filed by the owner of the steamboat Thomas Kiley, against the schooner Arlington, claiming \$1,000 for salvage, by reason of services rendered to the schooner, by the steamboat, on the 20th of August, 1866, in towing her from a slip in Jersey city, New Jersey, into the Hudson River, during a fire which was burning on shore. The libellant was not on board of the steamboat at the time, and did not personally render any of the services. The case, therefore, is not one of salvage (*The Charlotte*, 3 *W. Rob.* 68, 72; *The Jack Jewett*, *ante p.* 463). But the libellant is entitled to an equitable compensation for the use of his steamboat in towing the schooner. On the evidence, the libel grossly exaggerates the danger both to the schooner and to the steamboat at the time the service was performed. It avers that the master and owner of the schooner refused to pay more than the sum of \$50 for the service, and that that sum is too trifling. I think it is sufficient. The service did not occupy more than from two to three hours, another vessel was towed out by the steamboat at the same time, and the steamboat was not diverted from any other occupation to render the service, as she voluntarily went to the spot to render such service as she could, and was engaged by the other vessel, before referred to, prior to the time when the schooner applied to her. The evidence is that the steamboat usually received from ten to fifteen dollars an hour for towing. A decree will be entered for \$50, but without costs to the libellants. If the claimants had shown a tender of the \$50, or had

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In the Matter of Charles McBrien, a Bankrupt.

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brought that amount into court, I should have awarded costs to them.

*W. J. Haskett*, for the libellant.

*R. H. Huntley*, for the claimants.

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OCTOBER, 1868.

IN THE MATTER OF CHARLES MCBRIEN, A  
BANKRUPT.

EXAMINATION OF BANKRUPT.

Where the assignee of a bankrupt applied for an order for his examination, which was granted, and, after his examination under it had been commenced, the bankrupt moved to vacate the order because it was not founded on affidavit, which motion the register denied:

*Held*, That the register's decision was correct.

In this case the assignee of the bankrupt made application in writing to the register for an order directing the bankrupt to attend and be examined pursuant to the 26th section of the bankruptcy Act. The register made the order, and in pursuance of it the bankrupt attended, and his examination was commenced and then adjourned. On the adjourned day, the bankrupt's counsel moved to vacate the order, because the application for it was not made on affidavit. The register refused to vacate it, and, on the bankrupt's request, certified the question to the court, which sustained the ruling of the register.

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In the Matter of Joseph D. Crockett and Christian F. Schramm, Bankrupts.

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OCTOBER, 1868.

**IN THE MATTER OF THE PETITION OF JOSEPH D. CROCKETT & CHRISTIAN F. SCHRAMM, FOR AN ADJUDICATION OF BANKRUPTCY OF THEMSELVES AND JAMES C. JEWETT AS THEIR COPARTNER.**

**BANKRUPTCY.—WHAT ARE COPARTNERSHIP ASSETS.—DISSOLUTION.**

A formal dissolution of a partnership will not prevent the operation of the bankruptcy Act upon the partners, so long as there are partnership debts and partnership assets existing.

C. & S. applied for an adjudication of bankruptcy against themselves and J. as partners. The partnership did not exist at the time the petition was filed. There were partnership debts, but no partnership assets except a claim against B. & Co., for damages arising out of their fraudulent recommendation of a person to the firm, in consequence of which the firm intrusted property to him, which he failed to account for.

*Held*, That such a claim was not within the description, in the fourteenth section of the Act, of the assets which pass to the assignee in bankruptcy, and that the petition as to J. must be dismissed with costs.

**BLATCHFORD, J.** The petitioners set forth in their petition that they and one James C. Jewett are copartners; that the members of the copartnership are unable to pay their debts in full; and that Jewett refuses to join in the petition. The prayer of the petition is that the petitioners and Jewett may be adjudged bankrupts. There are schedules annexed setting forth debts and assets of the copartnership. The answer of Jewett to the petition avers that he has not been a partner with Crockett since January 1st, 1867; that Schramm is not and never was a copartner with Jewett, or with Jewett and Crockett; and that there was not, when the petition was filed, any property in existence which belonged to Jewett, in con-

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In the Matter of Joseph D. Crockett and Christian F. Schramm, Bankrupts.

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nection with the petitioners, or either of them, as copartners, or otherwise. The answer also denies specifically the existence of the assets named in the petition as assets of the copartnership. On the issue thus raised, testimony has been taken.

The thirty-sixth section of the bankruptcy Act provides that two or more persons, "who are partners in trade," may be adjudged bankrupt on the petition of the partners or of any one of them. The language of the fourteenth section of the bankruptcy Act of 1841, in this particular, was substantially the same as is that of the thirty-sixth section of the present Act. Such language can only apply to a subsisting copartnership (*In re Hartz*, 1 N. Y. *Legal Observer*, 39). But a mere formal dissolution of the copartnership, so long as there are partnership debts and partnership assets existing, the partners being joint debtors and the assets being joint property, will not prevent the operation of the act upon the partners, either in a voluntary or an involuntary case. This has been so held under a provision of the Massachusetts insolvent law, similar in language to that found in the thirty-sixth section of the present bankruptcy Act (*McDaniel v. King*, 5 *Cushing*, 469, 476). Where there are assets as well as debts of the copartnership remaining, the copartnership may properly be considered as subsisting *quoad* its creditors, and for the purpose of applying its joint stock and property to the payment of its creditors. There is every reason for such a construction of the Act, and no reason for a different one.

In the present case, I am satisfied, from the evidence, that there was no partnership subsisting between the petitioners and Jewett when the petition was filed. As there were debts of the former copartnership, the only remaining question is, whether, at the time the petition was filed, there were any assets of the copartnership in existence. The only copartnership

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*In the Matter of Joseph D. Crockett and Christian F. Schramm, Bankrupts.*

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assets mentioned in the schedule to the petition are set forth thus: "Merchandise in the cities of Hongkong and Shanghai, China, and in Matamoros, Mexico; Policies of insurance made by the following companies: Columbian Insurance Co., Great Western Insurance Co., Sun Mutual Insurance Co.; Claims against Insurance Companies heretofore named, of no fixed value; Claim against Black, Brothers & Co. for damages on letter of recommendation, no fixed value—above claims now in suit; Claim against W. C. Pickersgill & Co., now in suit." The substance of the testimony of the petitioners, as to these claims, is that they have never been disposed of to their knowledge. But it is shown that neither one of the petitioners had anything but a general knowledge as to these claims, and that Jewett had specific knowledge in regard to them. Jewett shows satisfactorily that no merchandise, in China or Mexico, belonging to himself, or either of the petitioners, or to the copartnership, existed when the petition was filed; and that a claim in favor of the copartnership against one, and only one, of the three insurance companies named, and a claim against Pickersgill & Co., once existed, but that those claims were transferred long before the filing of the petition. The claim against Black, Brothers & Co. is shown to be a claim in suit, arising from the fact that Black, Brothers & Co. recommended a certain person to the copartnership as worthy of trust, and that the copartnership, on such recommendation, entrusted merchandise to such person for sale, and he disposed of it, and did not account for the proceeds. The suit is brought for fraudulently and deceitfully recommending the person as worthy of trust and confidence. Such a claim is not within the description, in the fourteenth section of the Act, of the assets which pass to the assignee in bankruptcy. It is not a debt, or a security for a debt, or a right in equity, or a chose in action, or a right of action for property. Nor is it a right of action for a cause of



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In the Matter of Henrietta A. Richardson and Josiah B. Richardson, Bankrupts.

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action arising from contract. It is an action of tort for the fraud and deceit, and not an action on a contract.

The petition must be dismissed, as to Jewett, with costs.

*C. N. Black*, for the petitioners.

*Dan Marvin*, for Jewett.

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OCTOBER, 1868.

IN THE MATTER OF THE PETITION OF HENRIETTA A. RICHARDSON AND JOSIAH B. RICHARDSON, BANKRUPTS.

POWER OF THE COURT.—DIFFERENT DISTRICTS.

Where bankruptcy proceedings had been commenced and were pending in Louisiana, and, thereafter, a suit was commenced against the bankrupts, in a court of the State of New York, to collect a debt provable in bankruptcy, and the bankrupts applied to this court, on petition, for an injunction staying proceedings in that suit until the close of the bankruptcy proceedings in Louisiana:

*Held*, That a District Court of the United States had no power to grant such relief, independently of the bankruptcy Act;

That no such power was conferred on any District Court, by the bankruptcy Act, except that one in which the bankruptcy proceedings were pending.

BLATCHFORD, J. The petitioners reside in New Orleans. They have been adjudged bankrupts by the District Court of the United States for the District of Louisiana. They now present a petition to this Court, setting forth that one Withers has brought a suit against them in the Supreme Court of New York, in the nature of an action in debt, to recover \$24,032.71 on two promissory notes made by the petitioners, payable to the said plaintiff or order; that the petitioners have appeared in

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*In the Matter of Henrietta A. Richardson and Josiah B. Richardson, Bankrupts.*

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said suit, and put in an answer denying any indebtedness to the plaintiff on the notes; and that the indebtedness, if any, is provable under the proceedings in bankruptcy. The petition prays for an injunction to be issued by this court, restraining all further proceedings in said action until the final adjudication of the District Court in Louisiana, in the proceedings there pending.

Independently of the bankruptcy Act of 1867, a District Court of the United States can have no jurisdiction to grant the relief asked for by this petition. No such jurisdiction is conferred upon a District Court by any statute of the United States, unless it is conferred by such bankruptcy Act. The question to be determined, therefore, is whether, by that Act, any power is conferred upon this Court to grant the prayer of this petition.

The first section of the Act is limited to the powers of the court in which the bankruptcy proceedings are pending—the court in which the proceedings in bankruptcy are commenced in the manner specified in the thirty-eighth section of the Act.

The second section is also limited to the powers of the District Court of the district where the proceedings in bankruptcy are pending, and to the powers of that court in regard to suits by and against the assignee in bankruptcy.

The twenty-first section, which is the one giving to District Courts the power of granting injunctions to stay suits and proceedings to recover debts from bankrupts, cannot be construed as conferring such power upon any other District Court than the “court in bankruptcy,” which means the court where the bankrupt proceedings are pending.

No other section of the Act confers upon this court the power invoked.

Whether the petitioners, as citizens of Louisiana, could not obtain relief by a proper form of suit in the

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Circuit Court for this district, under the general equity powers which that court exercises independently of the bankruptcy Act, or whether, by reason of the inability of the District Court of Louisiana to extend its remedial functions so as to make efficient the relief asked for here, and the want of power in this Court to grant such relief, the petitioners and others in a like position are without practical remedy in the courts of the United States, unless there be further legislation by Congress on the subject, are questions I am not here called upon to determine.

I ought, perhaps, to say, that if the proceedings in bankruptcy by the petitioners were pending in this Court, the case is hardly one in which this Court would interpose, under the twenty-first section, by injunction, to stay the suit in the State Court, for the reason that the indebtedness is disputed. The suit would be allowed, under the twenty-first section, to proceed to judgment for the purpose of ascertaining the amount due.

*N. Appleton*, attorney for petitioners.

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OCTOBER, 1868.

## THE STEAMER SANTEE.

## BILL OF LADING.—SPECIAL CLAUSE.—DELIVERY OF CARGO.—AGENT.

Under an ordinary bill of lading, delivery on a wharf of the goods transported by the vessel is sufficient, provided due notice be given to the consignee, and provided the different consignments are properly separated, so as to be open to inspection by their respective owners, and a fair opportunity is afforded to the consignee to remove his goods.

Under such a bill of lading, the carrier is responsible for the value of the goods, if he deliver them to the wrong person, even though by mistake or imposition.

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The Steamer Santee.

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Where a bill of lading for cotton contained the following clauses: "It is expressly understood that the articles named in this bill of lading shall be at the risk of the owner, shipper, or consignee thereof, as soon as delivered from the tackles of the steamer at her port of destination, \* \* \* \* \* and they shall be received by the consignee thereof package by package, as so delivered, and, if not taken away the same day by him, they may (at the option of the steamer's agent) be sent to store, or permitted to lie where landed, at the expense and risk of the aforesaid owner, shipper, or consignee."

*Held*, That such clauses were not unreasonable, and were such as a court should enforce.

Where 142 bales of cotton were shipped on board a vessel, under bills of lading containing the above special clauses, there being also other cotton on board, and, on the arrival of the vessel, the consignee of the 142 bales paid the freight on them, and sent carts to remove them before any of them were discharged, and all of the 142 bales were discharged from the vessel on the wharf, but thirteen of them were not received by the consignee, and it did not appear what had become of them, but, after all the other consignees had received all the cotton which they claimed, there remained on the dock thirteen bales without marks, which did not form part of the 142 bales, the cotton having been unladen bale by bale, and the mate of the vessel having tried to separate the various consignments after the bales were landed, and having required receipts to be given for all the cotton that was removed from the wharf before he would allow it to be removed:

*Held*, That the vessel was not liable for the value of the missing bales;

That the duty of the vessel, under the bill of lading, was discharged when the cotton was put on the dock;

That, under the bill of lading, the consignees, having had due previous notice, were bound to examine each bale as it left the vessel's tackles, and was deposited on the wharf, and see if it was their cotton;

That any custody or control of the cotton on the wharf which the mate assumed to exercise over it was unauthorized, and he had no right to demand a receipt before allowing it to be removed from the wharf.\*

BLATCHFORD, J. This libel is filed against the steamer Santee, to recover the sum of \$5,000, as the value of thirteen bales of cotton shipped from Mobile to New York by that vessel. The libellants' claim is founded on two bills of lading, one dated January 19th, 1866, for seventy-two bales, and the other dated January 24th, 1866, for seventy bales. The shipment was by Baker, Robbins & Co.; and each bill of lading specifies

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\* The decree in this case was affirmed by the Circuit Court, in May, 1870.

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The Steamer Santee.

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that the bales of cotton described in it (and the marks on which are given in the bills of lading) shall be delivered at the port of New York, the dangers of the seas, &c., excepted, to the libellants, Sawyer & Wallace, or their assigns. Each bill of lading also contains, following the foregoing delivery clause, these words: "It is expressly understood that the articles named in this bill of lading shall be at the risk of the owner, shipper, or consignee thereof, as soon as delivered from the tackles of the steamer at her port of destination (the collector of the port being hereby authorized to grant a general order of discharge immediately after the entry of the ship), and they shall be received either at New York or Brooklyn, by the consignee thereof, package by package, as so delivered, and if not taken away the same day by him, they may (at the option of the steamers' agents) be sent to store or permitted to lay where landed at the expense and risk of the aforesaid owner, shipper, or consignee." The one hundred and forty-two bales were properly marked and numbered when they were shipped, with the same marks and numbers set forth in the bills of lading. The entire cargo was cotton, except that there was one bag of wool. There were, in all, on board, seven hundred and ten bales of cotton, shipped under bills of lading. On the arrival of the steamer at New York, the libellants paid the freight to the agents of the steamer, on the one hundred and forty-two bales of cotton, on the presentation of a bill therefor by such agents, and before any of the cotton was unladen from the vessel. Only one hundred and twenty-nine of the bales specified in the bills of lading came to the possession of the libellants. The whole one hundred and forty-two bales were unladen from the vessel at New York, and placed upon the wharf. After all the parties, except the libellants, who claimed cotton that was on board of the vessel, had removed from the wharf such cotton as they desired to re-

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move, there remained on the wharf thirteen bales of cotton, but none of those bales corresponded, as to mark or number, with any of the bales consigned to the libellants, and it is clear, from the evidence, that no one of those thirteen bales was cotton consigned to the libellants. It is not denied by the claimant that the vessel was bound to deliver, under the bills of lading, the identical bales of cotton that were shipped. The claimant insists, however, that the responsibility of the vessel under the bills of lading was discharged by the unlading of the cotton specified in the bills of lading, from the vessel, and its deposit on the wharf, after notice to the libellants of the arrival of the vessel and of the place where the cotton would be discharged. In regard to this point, not only did the libellants know of the arrival of the vessel, and pay the freight on the cotton, but it is shown that the libellants sent cartmen with carts to the wharf where the vessel was lying, to receive the cotton, before the vessel commenced to discharge the cargo. The libellants claim that the vessel failed to comply with the bills of lading, in not delivering the thirteen bales to the libellants, and in wrongfully delivering them to some other party. No evidence is given to show what became of those thirteen bales. The libellants also claim that the special clause in the bills of lading does not relieve the vessel from liability; that the conditions contained in it are unreasonable and should not be enforced; that if the consignees were required under it to receive the cargo, package by package, then the entire cotton on board should have been assorted on the vessel, and the lot belonging to each consignee should have been delivered by itself and at one time; that as, in this case, no separation was attempted until after the cotton was landed on the wharf, the consignees were thereby absolved from the duty of receiving the cotton package by package; and that, notwithstanding such special clause, the general rule is

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applicable to this case, which requires that the different consignments in a cargo, shall, when discharged, be separated by the vessel, so as to render them accessible to their respective consignees. It is shown that in this case the cargo of cotton was unladen, bale by bale, as it came to hand, without reference to what consignment it belonged to; that the mate of the vessel, who had charge of the unloading of her, tried to separate the various consignments of cotton, and among others, the consignment of the libellants, after the bales were landed, and that receipts were required by the mate, and were given, for all the cotton that was removed from the wharf, before it was allowed by him to be removed. It is insisted by the libellants that this course of conduct shows that the vessel claimed, retained, and exercised possession of the cotton after it was landed on the wharf; that, therefore, the mate, acting for the vessel, must have made a wrong delivery of the thirteen bales of cotton; and that the case is thereby taken out of the operation of the special clause in the bill of lading.

The special clause in question is, so far as my observation extends, one recently introduced into bills of lading, and I am not aware that any judicial construction has been given to it. The general law, in the case of an ordinary bill of lading, containing merely the usual clause for delivery to the consignee at the port named, is well established—that delivery on the wharf of the goods transported by the vessel is sufficient, provided due notice be given to the consignee, and provided, also, the different consignments are properly separated so as to be open to inspection by their respective owners, and a fair opportunity is afforded to the consignee to remove his goods, but that the carrier is responsible for the value of the goods if he delivers them to the wrong person, even though by mistake or imposition (*The Eddy*, 5 *Wallace*, 481, 495;

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*Story on Bailments*, § 545 b ; *The Huntress*, *Davies' R.* 82, 87). Under the ordinary bill of lading, the due and proper separation of the goods by the carrier for the use of the consignee is an indispensable prerequisite, in addition to notice to the consignee of the time and place of delivery, to relieve the carrier from responsibility (3 *Kent's Comm.* 215 ; *The Eddy*, *above cited* ; *Partridge v. The Ben Adams*, *ante p.* 445). But, I think the rule is different in regard to a bill of lading containing the special clause in question. That clause seems to have been introduced in view of the law as settled in regard to what is required to constitute a delivery under an ordinary bill of lading. It seems to have been framed expressly to relieve the vessel from the responsibility of separating the different consignments on the wharf after they are unladen. It provides, first, that the cotton shall be at the risk of the consignee as soon as it shall be "delivered from the tackles" of the vessel, at New York. If the case rested on this clause alone, there might be a question as to the meaning of the word "delivered," and, although the clause does not speak of a delivery to any person, but only of a delivery "from the tackles of the vessel," it might fairly be argued that the word "delivered" is here used in the same sense in which it is used in the earlier portion of the bill of lading, where provision is made for a delivery to the consignees—a sense, the meaning of which is fixed as above explained. But the clause goes on to provide, secondly, that the cotton shall be received either at New York or Brooklyn, by the consignee thereof, "package by package, as so delivered." The words "so delivered," means, as delivered from the tackles of the vessel ; and this branch of the clause shows that the delivery from the tackles of the vessel is, in the view of the parties to the contract, something distinct, as an act, from the receipt of the article by the consignee. This second branch of the



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clause authorizes the vessel to deliver the cotton from her tackles, package by package, that is, bale by bale, and requires the consignee to receive each bale as and when so delivered. But, even under this clause, it might perhaps be properly contended that the delivery from the tackles intended by it is a delivery to the consignee, and not a delivery to some other person. The third branch, however, of the clause, provides, that if the cotton, after it shall be so delivered from the tackles, shall not be taken away the same day by the consignee, it may, at the option of the agents of the vessel, be "sent to store," or be "permitted to lay where landed" at the expense and risk of the consignee. This provision is not ambiguous, and plainly shows that the parties intended that a landing of the cotton on the wharf, at the place of destination, should be regarded as a delivery of it from the tackles of the vessel. All three branches of the clause must be construed together. When so construed, there is no room for doubt as to what the contract is. As each bale of the cotton is landed on the wharf from the tackles of the vessel, the responsibility of the vessel in regard to it ceases, and the risk of the consignee in regard to it commences. I agree that if the vessel discharges the cotton from her tackles upon the cart of some other person than the consignee, she makes a wrong delivery of it, and her responsibility for it continues. But that is not the present case. As each bale of this cotton left the tackles of the vessel, and was deposited on the wharf, the consignees, having had due previous notice, were bound to examine it and see whether it was or was not their cotton. Any custody or control of the cotton, which the mate of the vessel assumed to exercise after the cotton was landed on the wharf, was in violation of the terms of the bills of lading, and was wholly unauthorized. After it was placed on the wharf from the tackles of the vessel, the mate had no right to require from the

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consignees a receipt for it, and they had the right to take it without giving a receipt for it. Under the special clause, the consignees undertook the entire obligation of seeing to the removal of their cotton from the wharf, and the responsibility of the vessel, in regard to the cotton, ceased as soon as it was landed on the wharf from her tackles. The vessel was not bound to separate the libellants' cotton, either on the vessel or on the wharf, from the cotton of other parties, except by landing it, bale by bale, on the wharf. By landing the libellants' cotton on the wharf, the vessel afforded to them all the opportunity to remove the cotton from the wharf which she was bound by her contract to afford, and made all the designation and separation of the cotton which she was bound to make. Such landing on the wharf, after due previous notice, was a delivery to the right person, the freight having been paid, even though the wrong person afterwards obtained possession of the cotton.

It is argued on the part of the claimant, that this interpretation of the bills of lading is inconsistent with the doctrine, that the vessel's lien on the cargo for freight continues after the landing or unloading of the cargo, and that the vessel may, after such landing of the cargo, refuse to deliver it to the consignee till the freight is paid (*Certain Logs of Mahogany*, 2 *Sumner*, 589, 601.) No such question arises in this case, as the freight was paid in advance of the unloading. But I do not perceive the inconsistency suggested. Under the bills of lading in question here, the cotton was at the risk of the consignee as soon as it was landed on the wharf, but, if the freight had not been previously paid, the vessel would have had a right to retain possession of the cotton so on the wharf, and her lien for freight on it would have continued. The consignee could not have claimed that such landing was such a delivery to him as to destroy the vessel's lien on it for the

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The Schooner Grapeshot.

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freight, while at the same time, the clauses in the bills of lading in regard to the risk of the consignee would have operated in full force. In the case of 151 Tons of Coal (4 *Blatchf. C. C. R.* 368), it was held, that the mere manual delivery of an article by a carrier to the consignee, does not, of itself, operate necessarily to discharge the carrier's lien for the freight, but the delivery must be made with the intent of parting with the lien.

I perceive nothing unreasonable in the conditions of these bills of lading, and nothing that a court should hesitate to maintain. The contract is a plain one, deliberately entered into by intelligent commercial men, and the libellants had it entirely in their power to comply with its terms by stationing a proper person to watch for their cotton as it left the tackles of the vessel for the wharf.

The libel must be dismissed, with costs.

*E. H. Owen* and *S. P. Nash*, for the libellants.

*C. Donohue* and *L. B. Bunnell*, for the claimant.

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OCTOBER, 1868.

## IN THE MATTER OF THE PROCEEDS OF THE SCHOONER GRAPESHOT.

PRIORITIES.—LIEN FOR CARGO SOLD, AND FOR SUPPLIES PREVIOUSLY  
FURNISHED.

Where a vessel had been libelled by an owner of cargo shipped on board and sold by her master for the necessities of the vessel, and was condemned by default and sold, and the proceeds were insufficient to pay the libellant's claim, and thereafter a material-man, who had furnished supplies to the vessel before the sale of the cargo, applied to stay proceedings and open the default as to him :

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*The Schooner Grapeshot.*

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*Held*, That the lien for the cargo sold was prior to that for the materials previously furnished ;

That the owner of the cargo, therefore, ought not to be put to the expense of contesting the material-man's claim, and that the petition must be denied.

THIS was a petition filed on behalf of one O'Brien, a material-man, seeking to be paid the amount of certain supplies furnished the schooner Grapeshot, in the port of New Orleans, out of the proceeds of that vessel now in the registry of the court. The vessel had been originally proceeded against by Otto J. Eggers and others, owners of certain cargo which had been shipped on the vessel to be transported from this port to Gonives, Hayti, but which had been sold by the master of the vessel to raise money to pay sailors and repair the vessel, to enable her to depart from Turk's Island, where she had gone in distress, and reach her home port. To this action of the owners of the cargo no defence was interposed on the part of the owners of the vessel, and the vessel having been condemned by default, the proceeds were brought into the registry, and were insufficient in amount to satisfy the demand of the libellant Eggers. Before the distribution of the fund, however, the present petition was filed, and there being no real dispute as to the facts upon which the question of priority between the two demands must depend, in order to raise the question the petitioner moved, upon notice to the first libellant, for an order of short publication and for a stay of the distribution of the fund, and that the default as against the petitioner be opened.

For the application, *T. D. Hall*.

In opposition, *T. Scudder*.

BENEDICT, J. Inasmuch as it appears that the fund in court is insufficient to discharge the amount claimed by the libellant Eggers, it is manifest that he should not be

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The Schooner Grapeshot.

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put to the expense of interposing a defence to the petition of O'Brien, unless the claim is one which, if substantiated, would be entitled to a priority over the claim of Eggers in the distribution of the fund in court. Upon this question I entertain no doubt. The claim of the petitioner arises out of supplies furnished the vessel in New Orleans. The claim of Eggers arises out of a cargo afterward sold by the master in good faith, in a port of distress, when it was impossible otherwise to raise money to pay for supplies furnished to the vessel. The money thus raised from the sale of the cargo was in good faith applied by the master to prevent a condemnation and sale of the vessel in Turks Island, and to enable her to reach New York. This was a proceeding for the benefit of the petitioner, as thereby the vessel, upon which he claims to have had a lien, was saved from condemnation, and enabled to reach her home, where it might be that her owners could discharge the debts, or if not, where the vessel could be sold to better advantage than by condemnation in Turks Island. They cannot, therefore, in equity, ask to be paid in preference to the owners of the cargo so sold. The present motion, therefore, which, under ordinary circumstances, would be granted as of course, made as it is for the purpose of saving expense by an early decision of the question of priority raised and involving in its decision no interests other than of the petitioner and the libellant, who has appeared to oppose it, is denied.

## Eastern District of New York.

OCTOBER, 1868.

JEREMIAH CASEY *et al.* v. CHARLES C. LEARY.

SUPPLIES AND REPAIRS.—OWNERSHIP OF VESSEL.—OATH AGAINST  
OATH.

Where a suit was brought against L., as owner of a steamer, to recover for supplies furnished to her in the fall of 1867, and issue was taken on the question of ownership, and the libellants proved a conveyance of the vessel to him in 1865, and an oath of ownership made by him at the Custom-House on the same day, and a subsequent oath to the same effect made in November, 1867, and the answer set up that he had been compelled to appear in the cause by an attachment of the vessel as his property, but the defendant, on the trial, testified that he never had any interest in the vessel whatever :

*Held*, That if the recorded owner of a vessel, who has sworn that he is her owner, may be allowed to take the position that he has no interest in her, it is not unreasonable to require that such position should be sustained by some other proof than the declaration of the party himself;

That the defendant in this case must be held liable as owner.

The power of the court to issue an attachment against a non-resident of the district, re-affirmed.

BENEDICT, J. This action is brought against the defendant, as owner of the steamer Saragossa, to recover the amount of a bill of supplies furnished that vessel in this port, during the months of September, October, November, and December, 1867. No question is made as to the fact that the articles sued for were furnished the vessel and were necessary ; but it is insisted that the defendant was not the owner of the vessel nor interested therein. To prove the defendant's ownership, the libellants have put in evidence a bill of sale of the steamer from George Leary to the defendant, executed and recorded on the 1st of November, 1865, together with an owner's oath made by the defendant on the same day,

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in which he declares "I am a citizen of the United States and the true and only owner of the said vessel." A similar oath made by the defendant in November, 1867, is also put in evidence. And it also appears from the testimony of the defendant that he was engaged in the shipping business and transacted some of the business of this vessel at his place of business in New York. The evidence for the defence consists of the testimony of the defendant, who now swears, that he never was an owner of or interested in the vessel—that she was never sailed for his account or benefit—that his brother, Arthur Leary, was the agent of the vessel, and whatever business of the vessel was transacted by the defendant was done by him in the capacity of agent of his brother Arthur, and by his direction. The defendant further testifies that he does not know for whom the vessel was being run, and that he can give only an impression as to who did own her. That he took the title and made the first oath at the request of his brother, but cannot recollect how he came to make the second one in 1867. No other testimony is produced to explain the defendant's relation to the vessel, and, upon this evidence, I am asked to adjudge that the defendant had no interest in the vessel, and therefore is not liable for these repairs. I cannot so adjudge upon the unsupported statement of the defendant, as made in court, in contradiction of his oaths at the Custom-House. The vessel was conveyed to the defendant by an absolute bill of sale; he then took a solemn oath, declaring himself to be the true and only owner of the vessel. This oath he repeated in 1867, and it seems to me to be asking much when the court is urged to disregard these oaths, and believe only the oath now made in court, to the effect that the former oaths were untrue. The question here, it should be noticed, is not whether the relation of the defendant to this vessel was that of a mortgagee or an owner, but whether he had any interest whatever. He does not claim to have held the

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title by way of security, but declares that he never was in any way interested in the vessel. This declaration, made in court, is in conflict with his two former declarations made at the Custom-House, and he has no right to complain if the court—compelled to elect which oath to believe—rejects the one which is made to avoid a pressing demand. Furthermore, the defendant, although he held the title to this valuable vessel, claims to be unable to say for whose benefit he held it, or who did own her. His brother, Arthur Leary, was the agent of the vessel, but he is not called to say by whom he was employed; nor is George Leary, who executed an absolute bill of sale of the vessel to the defendant, called to explain it, or to confirm the defendant in his present statement. If it be conceded that, notwithstanding the recording act of 1850, a party procuring himself to be recorded as owner of a vessel, and making oath that he is such owner, is at the liberty to take the position that he has no interest whatever therein—a question unnecessary to be considered here—it is certainly not unreasonable to require that the position, when taken, should be supported by other evidence than the declaration of the party, contradictory of his oath at the Custom-House, when such evidence is within his power. Again, the defendant, although declaring upon the stand that he never had any interest in the vessel, in his answer sets up that his appearance in the action was compelled by a seizure of her, and it is in evidence that the action was commenced by an attachment of this very vessel as the property of defendant, and that he thereupon appeared and procured her release by giving security. If he had no interest in the vessel, it is not easy to understand why he paid any attention to the seizure, nor to see how the attachment of another man's property compelled this man to appear. The fact that when the vessel was seized as the property of the defendant, no person but the defendant appears to have been affected by the seiz-



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The Steamer Queen.

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ure; that no person asked for her release; that he did so ask and sets up in defence that her seizure compelled him to appear, are significant circumstances, and it has not been made to appear how they can be reconciled with the position which the defendant has undertaken to maintain in this action. Upon the question of fact which the case presents, I feel bound therefore, upon the evidence as it stands, to hold against the defendant. A point of law as to the jurisdiction of the court, arising out of the fact that the defendant did not reside, and was not served with process, within this district, has been taken in this cause but not argued, this court having pronounced upon the point in a previous case. The decision in the case referred to (*Atkins v. The Fibre Disintegrating Company*), I have no desire to modify or retract, and it must stand as the law of this court until reversed by an appellate court. Let a decree be entered in favor of the libellant for the sum of \$827.78, with interest and costs.

For libellant, *Benedict & Benedict*.

For defendant, *Beebe, Donohue & Cook*.

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## Southern District of New York.

NOVEMBER, 1868.

### THE STEAMER QUEEN.

COLLISION IN NEW YORK HARBOR.—STEAMER AND SCHOONER.—  
PORTING HELM.—LIGHTS.

Where a collision occurred after sunset between a steamer and a schooner, and the schooner, though having no lights, was seen from the steamer at a distance variously estimated by her witnesses as from three-quarters of a mile to two miles, and the steamer alleged as a defence that the schooner changed her course, and it appeared that on seeing the alleged change of the schooner's

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The Steamer Queen.

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course, the steamer's helm, which was then amidships, was ported and kept hard a-port till the collision, although the schooner was then in such a position and so far off that there was time for the steamer, by a slight change of her helm to starboard, to have avoided the collision:

*Held*, That although the schooner should have had her lights set, the absence of them did not contribute to the collision;

That the schooner's course being seen and known by the steamer, the burden of proof was on the latter to show that the schooner changed her course at such a time that the steamer could not keep out of her way;

That she had failed to furnish such proof;

That the porting of the steamer's helm under the circumstances was the cause of the collision, and was a fault.

There is no obligation on a steamer, when there is danger of a collision with a sailing vessel, to port rather than to starboard her helm.

BLATCHFORD, J. This is a libel for a collision which took place early on the evening of the 13th of October, 1866, in the lower bay of New York, between the schooner Mary Ann Magee and the British steamer Queen. The schooner was sunk by the collision, and the libel is filed by her owners. She had come from the eastward through Long Island Sound, and was bound to Philadelphia. The steamer was bound to New York from sea. The schooner had no cargo. She had nearly all her sails set, the wind being moderate from the northeast, and was going at the rate of five or six knots an hour, and heading about south by west. She showed no light. The claim in the libel is that the persons on board of the schooner, when they first discerned the steamer, saw her from about a point and a half to two points on the starboard bow of the schooner, and from about a half to three-quarters of a mile distant; and that the steamer, when within a short distance of the schooner, suddenly changed her course and ran into the schooner. The steamer had all proper lights set. The claim in her answer is, that she saw the schooner a little on her port bow and some distance ahead; that her helm was then ported so as to bring the schooner from one and a half to two points on her port bow; that the respective courses of the two vessels continued until they were within a short distance of each other, when the helm

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The Steamer Queen.

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of the schooner was starboarded and she headed across the steamer's bow; and that the engine of the steamer was immediately stopped and backed and her helm ported, but the collision could not be avoided. The steamer with her stem struck the schooner on her starboard side, forward of her main rigging and about amidships.

As it was after sunset the schooner ought to have had her lights burning, but the absence of them cannot on the testimony be held to have contributed to the collision, as the pilot of the steamer says that when he first saw the schooner he saw how she was heading, and that he saw her before she was reported to him, and the witnesses from the steamer estimate the distance of the schooner when they saw her at from three quarters of a mile to two miles and a half. The schooner was, therefore, seen by the steamer at a sufficient distance off for the steamer to avoid her, and the course of the schooner was perceived by the pilot of the steamer at a sufficient distance off. The absence of lights on the schooner is not testified to, by any of the witnesses from the steamer, as having caused them any embarrassment, nor is any uncertainty alleged by them as to the position and course of the schooner at any time.

It was the duty of the steamer to keep out of the way of the schooner. She attempted to do so on seeing the schooner, and recognized her obligation by porting her helm until she brought the schooner to about two points on the port bow of the steamer. The witnesses from the steamer say that at all times until the schooner, as they allege, starboarded her helm and went across the steamer's bow, the schooner was not on the starboard bow of the steamer, while the testimony from the schooner is that the steamer was seen from one and a half to two points on the starboard bow of the schooner. The master of the steamer says that when he first saw the schooner, two miles and a little more off, she was

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The Steamer Queen.

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head and head with the steamer in a line. This is also the testimony of the pilot of the steamer, who says that by porting the helm of the steamer when he first saw the schooner he swung the steamer off about two points and brought the schooner about two points on the port bow of the steamer. The chief officer of the steamer says that when he first saw the steamer (and it was he who reported her), she bore right ahead and, if any thing, on his port bow. The defence of the steamer is put on the point that, after the steamer had ported so as to bring the schooner two points on the port bow of the steamer, the schooner suddenly starboarded her helm at so short a distance from the steamer that the collision could not be then avoided by the steamer, and that it was the fault wholly of the schooner. The pilot of the steamer says that the schooner starboarded at a distance of six hundred feet from the steamer, and that he immediately ordered the wheel of the steamer to be put hard a-port and her engine to be stopped and backed at full speed. As a reason for this order to hard a-port the pilot of the steamer says that after he first ported he gave an order to steady, but that, before that order was obeyed, he saw that the schooner had starboarded and gave the order to hard a-port; that there was not time to put the helm of the steamer to starboard; and that he does not think the order to hard a-port affected the motion of the steamer at all before the collision. The master of the steamer says that the order to hard a-port and stop was given when the schooner was about one thousand feet off from the steamer. The first officer of the steamer says that the schooner was six hundred feet off when she starboarded. Alltree, the second mate of the steamer, says that when the order to hard a-port was given on the steamer the schooner was six hundred or nine hundred feet off. Whalen, a seaman who was at the wheel of the steamer, says that the first order was steady port, which means port a little; that he

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The Steamer Queen.

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changed the steamer's course by porting a point and a half; that, some time after the order to port was given, an order came to hard a-port; that, after the hard a-port, the schooner made her appearance on the port bow of the steamer, heading across the bow of the steamer; that on the first order to port he put the wheel over ten degrees of the tell-tale, hard a-port being forty-five degrees, and held it there until he was told to steady; that when the order to steady came he eased the wheel back to midships; that the next order was hard a-port as hard as they could give it to her; that they put the wheel right hard across; that they had held the helm hard a-port for from five to eight minutes, as near as he can recollect, before the collision; and that they held the wheel hard to port to the time of the collision. The master of the schooner, who was at her wheel, says that he made no change of his wheel on seeing the steamer, or at any time up to the collision; and that he saw the steamer a half a mile or a mile off. He also says, that the steamer struck the schooner about fifteen to twenty feet forward of the main rigging on the starboard side, angling aft.

The schooner's position and course being seen by, and known by, the steamer, and it being the duty of the steamer to keep out of her way, and the duty of the schooner to keep her course, the burden of proof is on the steamer to show that the schooner did not keep her course, and that, if she changed her course, she did so at such a time and under such circumstances that the steamer could not keep out of her way. For if, after the schooner starboarded her helm, as alleged, she and the steamer were then proceeding in such direction as to involve risk of collision, it was as much the duty of the steamer then to keep out of her way as it was before the schooner starboarded. On all the evidence I am unable to resist the conclusion that the steamer has failed to establish that she could not have kept out of the way of

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*The Steamer Queen.*

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the schooner. She struck the schooner on the starboard side, about amidships, angling aft. It is manifest from this that a very slight starboarding of her helm on the part of the steamer would have caused her to clear the schooner, even if the schooner did, as alleged, starboard her helm and change her course. Assuming that the schooner did so, the steamer, by her own showing, persisted in porting from a midships helm to hard a-port, after the schooner starboarded. She thus threw herself directly toward and not away from the schooner. The testimony of the pilot of the steamer that he could not have starboarded when the schooner did so, is wholly contradicted by the testimony of Whalen, who was at the wheel of the steamer, and who shows that when the schooner starboarded and the order was given to hard a-port the wheel of the steamer, her wheel was amidships. It was therefore as easy to have starboarded the helm of the steamer at that time as to have ported it hard a-port. The error of the steamer was in then porting. The schooner, when she starboarded, if she did so, was far enough off, six hundred to one thousand feet, as shown by Whalen, to allow the steamer's wheel to be put from midships to hard a-port and remain there for some time before the collision. The same time would have sufficed to starboard the wheel enough to avoid the collision. Even if the steamer had not then starboarded, but had simply stopped and reversed without porting or starboarding, there would undoubtedly have been no collision. A steamer, when there is risk of collision, is required to stop and reverse. There is no obligation upon her to port rather than starboard, or to starboard rather than port her wheel, unless the porting or the starboarding is the proper manœuvre whereby to avoid the collision, and whichever is such proper manœuvre she is bound to follow it. I have observed, in collision cases between steamers and sailing vessels, a propensity shown on the part of the steamer very often to port her helm, when

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The Steamer Queen.

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that was not the proper manœuvre to avoid the collision, and when the porting was clearly improper. When two steamers are meeting, end on or nearly end on, so as to involve risk of collision, the helms of both must be put to port. But when a steamer and a sailing vessel are proceeding in such directions as to involve risk of collision, the steamer must keep out of the way of the sailing vessel, and if to do so a movement of her helm is necessary, there is no more obligation on her to port than there is to starboard, unless porting rather than starboarding will avoid the collision. The erroneous idea seems to prevail on the part of those directing the movements of steamers, that they will be free from blame if they port on meeting a sailing vessel with risk of collision; and I have had several cases before me recently of collisions between steamers and sailing vessels, where, as in the present one, the collision would not have happened, if the steamer had not persisted in porting instead of either starboarding or making no change at all in her wheel.

No fault, contributing to the collision, is shown on the part of the schooner, and there must be a decree for the libellants with costs, with a reference to a Commissioner to ascertain the damages caused to the libellants by the collision.

*E. H. Owen*, for the libellants.

*C. Donohue* and *J. Chetwood*, for the claimants.

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In the Matter of Beverly Clark, on Habeas Corpus.

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NOVEMBER, 1868.

IN THE MATTER OF BEVERLY CLARK, ON  
HABEAS CORPUS.HABEAS CORPUS.—EXAMINATION BEFORE COMMISSIONER.—EVIDENCE.  
—INDICTMENT IN ANOTHER DISTRICT.

Where, on writs of *habeas corpus* and *certiorari* to a United States Commissioner, it appeared that the Commissioner had issued a warrant to arrest the petitioner, on a charge of conspiring to defraud the United States, in the Eastern District of Michigan, who had been arrested and brought before him, and demanded an examination, and on the examination the evidence consisted of an indictment found against him in the Eastern District of Michigan, and proof that on that indictment the District Court of that District had issued a warrant for his arrest, the indictment averring that the prisoner, with certain others named, did, at the city of Washington, conspire, combine, confederate, and agree together to defraud the United States, in a manner particularly set forth, and that one of the parties to said conspiracy, named Lee, at Detroit, in the Eastern District of Michigan, in pursuance of said conspiracy, did do an act to effect the object of said conspiracy, said act being particularly set forth, and on such proof the Commissioner committed the prisoner for trial in the Eastern District of Michigan, and thereupon this *habeas corpus* was issued, and the discharge of the prisoner claimed, on the sole ground that the indictment produced did not aver that an offence against the United States had been committed in the Eastern District of Michigan:

*Held*, That the question whether the indictment sufficiently averred an offence committed in the Eastern District of Michigan should not be prejudged on a proceeding like this;

That on such a proceeding the indictment must be considered sufficient, unless it be so defective in its material averments that it would be the manifest duty of a court before which it was presented by a grand jury to decline to take action upon it;

That this indictment was not of that character.

Whether, in such a proceeding before a Commissioner, such an indictment can be examined, and its sufficiency passed upon—*quere*.

BENEDICT, J. The prisoner, Beverly Clark, being detained in custody by the marshal of this district, has been brought before me by a writ of *habeas corpus* and by a writ of *certiorari*. The proceedings before Com-



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missioner Osborn, which resulted in his committal, are also before me.

By these returns, it appears that in September last, a deputy marshal of the Eastern District of Michigan procured a warrant from Commissioner Osborn, in this district, directing the marshal of this district to apprehend and bring the prisoner before him to answer to a charge of conspiring to defraud the United States in the Eastern District of Michigan. The prisoner having been arrested on such warrant, was brought before the Commissioner, and demanded an examination, which was had. Upon this examination, an indictment found against the prisoner by a grand jury in the Eastern District of Michigan was put in evidence, together with proof that it had been filed in the District Court of that district, and was still pending undetermined, and that upon it the court had issued to the marshal of that district a warrant directing the arrest of the prisoner. No other evidence was produced to the Commissioner, and he thereupon committed the prisoner for trial in the Eastern District of Michigan, by virtue of which commitment he is now held by the marshal of this district.

The sufficiency of these proceedings is now called in question, and I am asked to discharge the prisoner because, as it is claimed, the indictment produced before the Commissioner does not aver that an offence against the United States has been committed in the Eastern District of Michigan.

In disposing of the single issue which has been thus made, I notice at the outset that the question here is not whether proof before a Commissioner of the fact that an indictment against the person before him has been found by a grand jury of the United States, in a court of the United States, and that such court has so far acted upon the indictment as to issue its warrant for the arrest of the person to answer to the charge, is not

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sufficient proof to require the Commissioner to commit such person for trial in the district where the indictment was found. Nor is the question here whether the proceedings in the District Court of Michigan would not have been sufficient to justify the detention by the marshal of this district, had that court seen fit to issue its bench warrant to that officer directly.

Here the proceeding seems to have been an original proceeding instituted in this district before Commissioner Osborn, in which the indictment itself was put in evidence, as showing sufficient cause for the committal of the prisoner for trial in Michigan.

The questions then are, whether, in such a mode of procedure, the Commissioner is at liberty to examine the indictment, and pass upon the sufficiency of its averments, and if so, whether the averments of this indictment are sufficient to warrant the committal of the prisoner for trial in Michigan.

For the purposes of this case, I shall assume—although I do not intend so to decide—that when the method of procedure is such as that adopted in this case, the indictment, which is put in evidence before the Commissioner, must be looked into, and accordingly I have examined the present indictment, and I find that it avers that the prisoner, with certain others named, did, at the city of Washington, conspire, combine, confederate, and agree together to defraud the United States, in the manner particularly set forth, and that Andrew T. Lee, one of the parties to said conspiracy, afterwards, at Detroit, in the Eastern District of Michigan, in pursuance of and according to said conspiracy, combination, and agreement, had as aforesaid, did do an act to effect the object of said conspiracy, which act is also particularly set forth. It was here intended to set out the offence created by the Act of March 2d, 1867, which declares, ‘that if two or more persons either conspire to commit any offence against the laws of the United States, or to

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In the Matter of Beverly Clark, on Habeas Corpus.

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defraud the United States in any manner whatever, and one or more of said parties to said conspiracy shall do any act to effect the object thereof, the parties to said conspiracy shall be deemed guilty of a misdemeanor;" and were this indictment before me upon demurrer or plea to the jurisdiction, it might not perhaps be difficult to decide whether the averment in question did or did not amount in law to an averment of an offence committed in Michigan. But that question, as it seems to me, should not be prejudged upon a proceeding like the present. Upon such a proceeding, the indictment must be considered sufficient, unless it be so defective in the material averments that it would be the manifest duty of a court before which it was presented by the grand jury to decline to take action upon it. In the present case, the court in Michigan has felt bound to receive this indictment, and to issue a warrant upon it; and, to my mind, the averment in question is not so clearly an averment of an offence committed in Washington, instead of one committed in Michigan, as to justify the Commissioner in refusing to commit the prisoner upon it, or to warrant his discharge before me. It raises a question which properly belongs to the court in which the indictment is pending.

My conclusion, therefore, is, that the prisoner must be remanded to the custody of the marshal.

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The Steamship Saragossa.

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NOVEMBER, 1866.

## THE STEAMSHIP SARAGOSSA.

## DELIVERY OF CARGO.—GOODS NOT PUT ON BOARD.—LIEN.

Where a libel alleged that 303 bales of cotton were shipped on board a steamer to be carried to New York, and that a bill of lading therefor, a copy of which was attached, was signed by the agents of the vessel, and that seven of the bales were not delivered, and were not lost by perils of the sea, and the answer admitted that the vessel agreed to carry the 303 bales, and that her agents signed a bill of lading, and alleged that a copy of it was attached to the libel, and alleged that only 273 bales were ever received on board the vessel, but that the rest were brought to New York by another vessel, and discharged upon the wharf, on due notice to the consignee:

*Held*, That on the pleadings, the authority of the agents to bind the vessel by the contract in the bill of lading must be considered as admitted;

That on the bill of lading, the burden of proof was on the vessel to show that the bill of lading was signed for bales of cotton that were never received on board the vessel;

That that fact was not proved by the mere statement of the pursuer of the vessel, that they received 303 bales, and left 30 behind;

That there was no proof of the delivery of the seven bales at New York, and the vessel was liable for their value.

BLATCHFORD, J. The libel avers the shipment on board of the steamship Saragossa, at Charleston, on the 17th of November, 1866, of 303 bales of cotton, under an agreement by the vessel to carry them to New York, and deliver them there to the agent of the libellants, such agreement being set forth in a bill of lading signed by the agents of the vessel. A copy of the bill of lading is annexed to the libel. It states that the 303 bales of cotton have been received "by E. N. Fuller, B. & F. agent S. C. R. Steamship called the Saragossa, whereof is master, now lying in the port of Charleston, S. C., and bound for New York." It gives the marks and numbers on the bales, and states that they are to be delivered at the port of New York, the danger

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The Steamer Saragossa.

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of the seas only excepted. It is not signed by the master or purser of the vessel, but is signed "Ravenel & Co., agents." The libel avers that the contract of the vessel was not performed by her, in that seven of the bales were never delivered in New York, and were not lost by dangers of the sea. The amount of damages claimed is \$1,291.39.

The answer admits that the vessel agreed to carry the 303 bales of cotton to New York, and deliver the same there to the person named in the bill of lading, and that the agents of the vessel signed a bill of lading for the cotton, wherein the agreement was more fully set forth, and that a copy of such bill of lading is annexed to the libel. The answer also avers that all of the bales of cotton that were taken on board under the bill of lading were delivered at New York; that on the arrival of the vessel at New York, with cotton on board received under the bill of lading, due notice of her arrival, and that he was required to attend to the receipt of the cotton laden on board, was given to the consignee named in the bill of lading; that thereafter the bales of cotton which were actually shipped on the vessel were duly discharged from the vessel, and that the vessel, both by law and the custom of the port, was entirely discharged from liability therefor; that only 273 bales of the cotton mentioned in the bill of lading were ever taken or received on board of the vessel; that those 273 bales were actually discharged upon the wharf from the vessel, on due notice to the consignee; and that the rest of the 303 bales were afterward brought to New York by the steamship Granada, and were, upon due notice, discharged upon the wharf, and delivered to the consignee.

It being admitted in the answer that the vessel agreed to carry the 303 bales of cotton to New York, and that the agents of the vessel signed the bill of lading in question, the authority of such agents to bind the

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The Steamer Saragossa.

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vessel, by signing the bill of lading, to whatever contract is set forth therein, must be considered as admitted and established, although the bill of lading is not signed by the master or purser of the vessel. The libellants gave no evidence in regard to the bill of lading, or in regard to the shipment of the cotton on board of the vessel. Their case, in this respect, rests wholly on the admissions of the answer. The bill of lading, though very inartificial, must, I think, be fairly interpreted as averring that the 303 bales of cotton were received on board of the Saragossa to be carried to New York. In the face of that evidence, it is for the claimant to show that the bill of lading was signed for bales of cotton that were never received on board of the vessel, in order to relieve her from responsibility. This the claimant undertook to do, but the evidence fails to show it. It is clear that the seven missing bales were part of the 303 bales. The purser of the vessel merely states that they received 303 bales in Charleston, and left 30 behind. Those 30, it is shown, were brought by the Granada. But the evidence on the part of the claimant is entirely consistent with the fact that the entire 303 bales were, as stated in the bill of lading, received on board of the Saragossa, and that then 30 of them were put back upon the wharf. The libellants received the 273 bales which the Saragossa brought, and 23 of the 30 which the Granada brought. The libellants had a right to rely on the bill of lading, and it was easy for the claimants to have shown, if the fact was so, that only the 273 bales went on board of the Saragossa, and that thus the bill of lading was signed for bales that were never received on board of her, so as to relieve the vessel from liability for any more than the 273 bales. The claimant has not made such proof, nor has he shown that the seven bales in question were delivered to the libellants at New York, according to the tenor of the bill of lading.

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The Steamboat Brooklyn.

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There must be a decree for the libellants, with a reference to ascertain the damages sustained by them.

*Robert D. Benedict*, for the libellants.

*Welcome R. Beebe*, for the claimants.

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NOVEMBER, 1868.

## THE STEAMBOAT BROOKLYN.

## TOWBOAT AND TOW.—JURISDICTION.—TORT.—NEGLIGENCE.

Where a canal-boat was taken in tow, with other boats, by a steamboat, at Albany, to be towed to the foot of North Moore street, in the city of New York, and, on their arrival there, the steamboat ran in near the dock to drop off the canal-boat, and signalled her to drop off, which she failed to do, and the steamboat kept on with her, there being many vessels at anchor in the harbor, leaving only a narrow channel near the piers, down which the tow passed, till near the Battery, when, owing to the sudden anchoring of two vessels ahead, the steamboat was compelled to stop, and the canal-boat was carried, by a strong north-east wind and an ebb tide, against pier 2, North river, and sunk, and the owner of the cargo filed a libel against the steamboat to recover the damages :

*Held*, That the Court of Admiralty had jurisdiction of the case as one of a tort committed on navigable waters, even though both vessels were navigating between ports of the same State.

That the duty of the steamboat not to injure the canal-boat did not arise out of the towage contract, but was imposed by the law, and she was liable in the Admiralty for negligent navigation, amounting to a breach of such duty;

That that duty was the same after the boats had passed North Moore street as before;

That the steamboat was guilty of negligence in navigating through the anchored vessels in such a narrow channel, instead of going out into the more open part of the harbor. The sudden anchoring of the vessels ahead of her was a circumstance which she should have anticipated.

The cases of *Allen v. Newberry* (21 How., 244), *Maguire v. Card* (*Id.* 248), and *Poag v. The McDonald*, commented upon.

THIS was a libel filed to recover damages for the loss

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The Steamboat Brooklyn.

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of about four thousand bushels of oats, and about fifteen hundred bushels of rye, shipped by the libellants, Isaac G. Parker and others, as owners thereof, on the 5th of May, 1863, at Fort Miller Bridge, Saratoga county, New York, on board of the canal-boat Ann Maria Nichols, to be transported, by the way of the Champlain Canal and the Hudson River, to the city of New York. The canal-boat arrived at West Troy, and entered the river, and was there taken in tow by the steamboat Brooklyn, to be towed to New York. The libel alleged that on the 14th of May, between the hours of twelve and two o'clock in the afternoon, the Brooklyn, having the canal-boat, with her cargo, in tow, carelessly ran the canal-boat against pier No. 2, in the North River, causing the canal-boat to fill, and to sink to the bottom with her cargo; that the loss to the libellants, which was stated at five thousand dollars, was caused by the carelessness and negligence of those navigating the Brooklyn, in carelessly towing the canal-boat against, and causing her to come into collision with, the said pier, when there was room enough to have passed without striking; and that the canal-boat could have done nothing to prevent the collision, as she was fast to, and under the control of, the Brooklyn. The libel did not aver any contract of towage by the Brooklyn, or any breach of any such contract by her, but merely, that the canal-boat, after her arrival at Troy, was taken in tow by the Brooklyn, for the purpose of being towed from Troy to New York, and that the loss happened by the alleged carelessness and negligence above referred to.

The defence set up in the answer was, in substance, that the Brooklyn engaged to tow the canal-boat only to off the foot of North Moore street, New York, which was above the place of collision; that when the Brooklyn reached New York, the wind was northeast, and the tide strong ebb; that a large fleet of wind-bound vessels was lying at anchor in the North River, extending



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The Steamboat Brooklyn.

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well over to the Jersey shore, leaving a channel open along the docks for the passage of boats and tows; that near North Moore street, the Brooklyn, with her tow, ran in as close as it was prudent to go, and blew her whistle for the canal-boat to drop off; that the canal-boat did not drop off; that, there being no opening through which the Brooklyn could safely take her tow out into the river, she kept on down the channel before spoken of; that when she was off pier No. 4, North River, two vessels came suddenly to anchor in the channel, ahead of her, and substantially closed it up, compelling her to stop her headway; and that the ebb tide then sagged the boats in tow toward the pier, and the canal-boat struck it.

*Townsend Scudder and John W. C. Leveridge*, for the libellants.

*Welcome R. Beebe and Charles M. Da Costa*, for the claimant.

BLATCHFORD, J. 1. An exception is taken to the jurisdiction of the court by the answer, and is urged on the ground that, the towing being done under a contract to tow the canal-boat from one place within the State of New York, to another place in the same State, this court has no jurisdiction to award the damages claimed in this suit. It is contended that, in view of the decision of the Supreme Court, in *Allen v. Newberry* (21 How., 244), to the effect that a District Court has no jurisdiction over a contract of affreightment of goods between two ports in the same State, and of the decision of the same court, in *Maguire v. Card* (*Id.*, 248), to the effect that a District Court has no jurisdiction over a contract for supplies furnished to a vessel engaged in the business of navigation and trade between ports exclusively within the same State, this court has

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The Steamboat Brooklyn.

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no jurisdiction to award damages in this suit for the loss sustained by the libellants. It is true that this court did, in the case of *Poag v. The McDonald* (*April*, 1859), dismiss the libel for want of jurisdiction, on a state of facts precisely like that in the present case, the decision being founded on the supposed effect of the decisions in *Allen v. Newberry* and *Maguire v. Card*. It is also true that Mr. Justice Nelson, in the Circuit Court, on an appeal taken in *Poag v. The McDonald* (*August*, 1860), sustained the dismissal of the libel for want of jurisdiction, on the view that, even though the suit were to be regarded as founded in tort, for negligence and carelessness, the District Court had no jurisdiction of it, because both of the vessels were, at the time of the commission of the tort, engaged solely in the internal commerce of the States. But this view has since that time been departed from, in practice, both by this court and by the Circuit Court. In *Langley v. The Syracuse* (*March*, 1867), which was a suit brought in this court, by the owner of a canal-boat towed from Albany to New York, against the steamboat which towed her, to recover for the damages occasioned through the wrongful and tortious act of the steamboat, by the sinking of the canal-boat while in tow of her, the same judge (Judge Betts) made a decree in favor of the libellant, who had dismissed the libel in *Poag v. The McDonald*, and that decree was affirmed by Mr. Justice Nelson, in the Circuit Court, as recently as in November, 1867 (6 *Blatchf. C. C. R.*, 2). Such I understand to be the settled law and practice of this court, and of the Circuit Court, in cases of like character; and I know that Mr. Justice Nelson does not adhere to the views expressed by him in his opinion delivered in the case of *Poag v. The McDonald*, so far as they apply to the question of jurisdiction involved in that case.

The question now raised was, in my judgment, disposed of by the decision of the Supreme Court at the

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The Steamboat Brooklyn.

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December term, 1861, in the case of *The Propeller Commerce* (1 *Black*, 574). That decision affirms that the admiralty has jurisdiction of torts committed on the navigable waters of the Atlantic coast which empty into the sea, including among them the navigable waters of the Hudson River ; and that, in a case of tort, nothing more is necessary to sustain the jurisdiction of the admiralty than to show that the tort was committed on such navigable waters. The only point of discussion, therefore, is whether the present case is one of tort. Now, the fact that the steamboat was at the time of the loss engaged in towing the canal-boat, under a contract of towage, either express or implied, does not make the negligent and careless navigation of the steamboat in performing such towage any the less a tort toward the canal-boat or her cargo, if injured thereby, than it would have been toward a third and stranger vessel which should have been injured thereby. Nor does the fact that such negligent navigation may be a breach of the contract of towage, make it any the less a tort toward the canal-boat or her cargo, if injured thereby. This view is sustainable entirely aside from any of the doctrines upon which the cases in regard to pure contracts are placed. In cases of contracts of affreightment and contracts for supplies, the obligation of the delinquent rests wholly upon the contract, and arises wholly out of it. In the present case, the obligation of the steamboat not to commit a tort against the canal boat did not arise out of the contract of towage, any more than the obligation of a third vessel meeting the canal-boat on her trip, not to collide with her, arose out of such contract or out of any contract. The obligation of the steamboat not to commit such tort arose out of the principle, applicable in all cases of tort—*sic utere tuo ut non alienum lædas*. Her duty did not result from the consideration paid or to be paid for the towage. It was imposed by the law, and would have existed even though her service had been gratuitous. If the libel-

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lants' property was lawfully where it was, the steamboat owed a duty toward it independent of any contract of towage, and is liable for a collision and the consequent damage to such property caused by negligent navigation amounting to a breach of such duty. The duty was of the same character as that imposed by the law upon a third and stranger vessel. (*Philadelphia and Reading Railroad Co. v. Derby*, 14 How., 468, 485, 486.) The present action, therefore, both on the libel and in fact, is one of tort, founded on negligence, and this court has jurisdiction of it.

2. It is urged on the part of the claimant, that the contract of towage ended at North Moore street, and that, as the canal-boat did not drop off there, but continued to adhere to the steamboat, the steamboat is only liable for willful default and negligence, which has not been shown. This view cannot be maintained. If the steamboat chose to go on with the canal-boat attached, after leaving North Moore street, and after the canal-boat had refused, notwithstanding signals from the steamboat, to drop off, both vessels must be regarded as assenting to the further towing of the canal-boat by the steamboat, and the canal-boat being lawfully where she was, the steamboat was under as much obligation afterward as before not to be guilty of negligent and careless navigation as respected the canal boat.

3. This canal-boat was one of ten boats in tow, one being on each side of the steamboat, and four in each of two tiers behind, drawn by hawsers. This canal-boat was the extreme outside boat to the left, coming down the river, in the rear tier. I cannot resist the conclusion, on the evidence, that, in view of the crowded condition of the river along the piers, it being full of vessels at anchor, leaving only a comparatively narrow channel, as far down as the Battery, between the line of anchored vessels and the piers, and of the fact that there was no opening in such line of vessels through which the steam-

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boat could safely pass with her tow to the open river beyond (a fact averred in the answer), and of the state of the tide, it being strong ebb and setting in upon the piers in the vicinity of the place of collision, and of the fact that the steamboat, from a sufficient distance above to have allowed her, before reaching the thickest part of the line of vessels, to pass out safely with her tow into the wide and open river beyond, could have seen, with proper vigilance, the condition of things in the confined channel into which she was entering, and of the fact that there was no necessity for her entering such channel, she was guilty of negligence in putting herself and this canal-boat in a position where a collision of the kind which happened was sure to occur, if any obstruction suddenly presented itself. The sudden coming around the Battery, from the East river, and anchoring of the two vessels, was a circumstance that ought to have been anticipated by the steamboat as likely to occur, with the wind and tide as they were. Her negligence consisted in getting herself and her tow into such a cramped position, so near to the piers, in such a tide.

4. There was no negligence on the part of the canal-boat, contributing to the accident. Her movements were wholly under the control of the steamboat.

There must be a decree for the libellants, with a reference to ascertain the damages sustained by them.

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In the Matter of John H. Kimball, a Bankrupt.

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NOVEMBER, 1868.

IN THE MATTER OF JOHN H. KIMBALL, A  
BANKRUPT.

DISCHARGE FROM ARREST.—FIDUCIARY DEBT.

Where K., who had been adjudicated a bankrupt, was afterward arrested on a warrant issued out of a State Court, on an affidavit stating that goods had been sent to him to sell on commission, which he had sold, and the proceeds of which he had failed to pay over on demand, and application was made to the Bankruptcy Court to discharge him from such arrest:

*Held*, That the Bankruptcy Court, in determining the question whether the arrest of a bankrupt is founded on a debt or claim from which his discharge would not release him, as provided by the 26th section of the Bankruptcy Act, can look only at the papers which were before the State Court, as the foundation of the arrest;

That the Bankruptcy Court could, therefore, look only at the affidavits on which the order of arrest was granted in the State Court, and not at the complaint in the action in that court, which was not then before it;

That on that affidavit the claim against the bankrupt was a debt created by the defalcation of the bankrupt, while acting in a fiduciary capacity, and he was not entitled to be discharged from the arrest.

THIS was an application to discharge the bankrupt from arrest. He filed his voluntary petition in bankruptcy in this court on the 21st of May, 1868, and was adjudicated a bankrupt on the 26th of May. On or about the 5th of June following, he was arrested on an order of arrest, made on that day by the Supreme Court of New York, in a civil action brought against him in that court, by James Beaty and others. The order of arrest, and consequently the arrest itself, were founded on an affidavit setting forth that on the 23d of December, 1867, the plaintiffs in the action sent from Erwin, Steuben County, New York, to the bankrupt at New York, 21,250 pounds of buckwheat flour, to sell upon commission; that the bankrupt received the flour to sell upon commission, and undertook to faithfully remit and

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In the Matter of John H. Kimball, a Bankrupt.

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pay over to the plaintiffs the proceeds of sale over and above his commission; that on or about the 20th of February, 1868, the bankrupt, as such commission agent, sold the flour and received therefor the sum of \$758.<sup>72</sup>/<sub>100</sub> over and above his commission, as the plaintiffs were informed by the bankrupt; that the bankrupt did not remit the proceeds of sale or any part thereof to the plaintiffs; that the plaintiffs afterward demanded from the bankrupt the proceeds of sale, less his commissions, and he refused to pay it over to them, saying that he did not then have the money, and had not the means of payment; that he had not paid to the plaintiffs such proceeds or any part thereof, but had applied the same to his own use, and closed his commission business; and that by reason of the premises the plaintiffs had sustained damage to the amount of \$758.79, and interest thereon from February 20th, 1868. On the hearing of the application, an issue of fact arose between the parties as to whether such arrest was founded on a debt or claim from which a discharge of said bankrupt in bankruptcy would not release him, and it was referred to a referee, under the thirty-eighth section of the bankruptcy Act, to take such testimony as might be produced before him in relation to said issue and report, and certify the same to the court. Testimony was taken by both parties before the referee, and the case was argued before the court upon such testimony.

*B. F. Watson*, for the bankrupt.

*R. D. Holmes*, for the creditors.

BLATCHFORD, J. This application is made under that clause of the twenty-sixth section of the bankruptcy Act which provides that "no bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy, in any civil action, unless the same is

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In the Matter of John H. Kimball, a Bankrupt.

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founded on some debt or claim from which his discharge in bankruptcy would not release him." Under this provision it has been held by this court (*In re Kimball, ante, p. 38*) that if the arrest is founded on a claim from which a discharge in bankruptcy would not release the bankrupt he is liable to the arrest, whether the action in which the arrest is made is founded on such claim or not, it frequently happening, in the practice of the courts of the State of New York, that the complaint in the action discloses a simple contract debt, while the affidavits on which the arrest is founded show that the debt was contracted by fraud, and is one which would not be discharged by a discharge in bankruptcy. Where a bankrupt is under arrest in a civil action during the pendency of the proceedings in bankruptcy, and his discharge from arrest is applied for on the ground that, under the said provision of the twenty-sixth section, he is not liable to such arrest, this court must determine whether the claim on which the arrest is founded is one from which a discharge in bankruptcy would not release him. The District Court of Massachusetts has held (*In re Devoe, 2 Bankrupt Register, 11*), that where it appears, by inspection of the proceedings in the State Court on which the arrest was made, that the arrest was founded by the State Court on a claim which appears, on the face of such proceedings, to be one of damages for fraud, the District Court is concluded, and cannot inquire whether such claim is well founded or ill founded. Although I have, heretofore, in some cases, been inclined to take a different view of the construction of this provision of the twenty-sixth section, and to hold that this court is called upon to inquire whether, upon all the facts existing between the parties to the claim in reference to its creation, it is or is not such a claim as is by the thirty-third section excepted from the operation of a discharge, yet I am satisfied, upon full consideration, that this view is erroneous, and that the interpretation given to the



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In the Matter of John H. Kimball, a Bankrupt.

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twenty-sixth section by the District Court of Massachusetts in the case of *In re Devoe*, before cited, is the correct one. It is true that the State Court has never passed upon the question whether the claim made by the creditor is one from which a discharge in bankruptcy would not release the debtor, but has only passed upon the question whether, by the State laws, the debtor was liable to arrest, and that this court is called upon to say whether the claim is one that would not be released by a discharge in bankruptcy. But, by the express terms of the twenty-sixth section, the claim to be inquired about is the one on which the State Court founded the arrest, the one presented by the creditor to the State Court, and on which it acted as the foundation for the arrest, the one in respect of which, as presented to it at the time, it decided that the debtor should be put or kept under arrest. The proceeding in this court to discharge a debtor from arrest, when he is held under arrest contrary to the provisions of the twenty-sixth section, is very limited in its scope. The action of this court is confined, in point of time, to the pendency of the proceedings in bankruptcy. They are pending, so far as the debtor is entitled to relief by virtue of this provision of the twenty-sixth section, only until the termination of proceedings for the discharge of the bankrupt. It was not intended, by the twenty-sixth section, or any other provision in the bankruptcy Act, that this court in bankruptcy should pass in a plenary manner upon the question whether a particular debt or claim will or will not be released by a discharge in bankruptcy. That question must be passed upon by the court in which the debt is sued on, and the discharge is pleaded, and it is replied that the debt is one excepted by the thirty-third section from the operation of the discharge. This court only passes on the question whether the State Court has founded its arrest upon a claim which on the face of the papers which were before it as the foundation for the

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In the Matter of John H. Kimball, a Bankrupt.

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arrest, is a claim from which the debtor would not be released by a discharge in bankruptcy.

Applying this view to the case at bar, the State Court had before it as the foundation on which it ordered the arrest, merely the affidavit before referred to. The order of arrest is dated June 5th, 1868. The complaint in the action was not sworn to until June 8th, 1868, and of course was not before the State Court when it granted the order of arrest, and it is not shown that the State Court has ever had before it as a foundation for making or retaining such order of arrest any other paper than such affidavit. The only question to be determined, therefore, is, whether the claim as stated in that affidavit, is one from which the debtor would not be released by a discharge in bankruptcy.

The claim stated in that affidavit is, that a quantity of buckwheat flour was sent by the plaintiffs to the bankrupt to be sold by him on commission; that he received it to sell on commission, and undertook to pay to the plaintiffs the proceeds of sale less his commission; and that he sold the flour, and received for it \$758.79 over and above his commission, but has not paid to the plaintiff such proceeds, or any part thereof. Is such a claim a debt created by the defalcation of the debtor while acting in a fiduciary capacity? I have heretofore decided, in the case of *In re Seymour* (1 *Benedict's Rep.*, p. 348), that such a claim is a debt of that character, and will not be discharged by a discharge in bankruptcy. My views as there stated are confirmed by the very thoroughly considered opinion of the Supreme Court of New York in the recent case of *Duguid v. Edwards* (50 *N. Y. & C. R.*, 280).

The application for the discharge of the bankrupt from arrest is denied.\*

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\* This decision was affirmed by the Circuit Court, on review (6 *Blanchf. C. C.*, 187).

## APPENDIX.

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### DIED,

At New Haven, November 3d, 1868, SAMUEL ROSSITER BETTS, for many years Judge of the District Court of the United States for the Southern District of New York.

The following were the proceedings in that Court on the announcement of his death on the following day, Judge BLATCHFORD, with Judge BENEDICT of the Eastern District, being on the bench.

Hon. SAMUEL G. COURTNEY, District Attorney of the United States, moved the adjournment of the Court as follows:

"May it please your Honors, I rise to perform the sad duty of announcing formally to the Court the death of Hon. SAMUEL R. BETTS, for nearly forty-five years the Judge of the United States District Court in this district. He died on Monday evening at New Haven, whither he had removed after his resignation of his seat upon the bench. My acquaintance with him was of recent date, but during the time that I have been officially connected with this Court, I have been brought into intimate relations with him, and I always found him courteous, kind, and urbane in every respect. To the older members of the bar his history is better known than to me, and I shall leave it to them to say what they have to say of his character and merits. I will only say that he died full of years and full of honors, and out of respect to his memory I move that this Court do now adjourn."

Mr. E. C. BENEDICT rose to second the motion, and said: "I feel that it is my painful duty to say a few words in seconding this motion,

because of my long acquaintance with Judge Betts, and my long practice in this Court. I had known him since 1823, when I was a student in his office, and his family I had known before that time. I have practiced almost uninterruptedly in this Court since his appointment in 1827, by Mr. Adams, who, together with Mr. Clay, signed his commission. He came to this city from the country, where he had been eminent at the bar, and for some years circuit judge. He came, therefore, with great familiarity with the legal questions which occupy the courts of common law, but with little acquaintance with those with which an admiralty court must deal. When he came here there was almost no business in the court. It did not then sit a week where now it sits a month. Thus he had leisure to familiarize himself with the law of admiralty, and he soon became one of the most learned judges in that branch of the law. As time went on the business of the Court increased, and his experience in admiralty became far more extended than that of any other judge that ever sat on the bench. He, more than any other man, formed the admiralty system of the United States. When he came to the bench the British view of the jurisdiction of the admiralty prevailed. He devoted himself to that branch of the law in the spirit which belonged to it of old, and which has since been adopted by the jurists and courts of this country, and his views have prevailed everywhere, though at first they were a novelty. His decisions were always characterized by acuteness, learning, and research. If they had been carefully reported they would have built up for him a reputation which would have been like that which the chancery decisions of this State gave Chancellor Kent, or which the English admiralty decisions gave to Lord Stowell. But in those days the newspapers were not, as they are now, volumes of reports, and Judge Betts always seemed not entirely satisfied with the form of his decisions, and was reluctant to publish them till he had given them a more perfect finish, and though I was appointed reporter of the Court many years ago, I did not succeed in getting together matter enough even for a pamphlet, before his greatly increased labors by the Bankrupt Act of 1840 prevented his giving any attention to it, and the idea was abandoned till its importance was destroyed by reports of other Courts.

"Judge Betts was a man of urbanity and kindness to all who practiced before him. All who practiced in his Court, young or old, always felt that they had had full opportunity to be heard, and that they had been treated with uniform kindness and courtesy—an excellent quality in a judge. We can hardly realize, in these days when

changes are so frequent upon the bench, what it was to have a judge upon the bench for forty years, as he was. He reached great age, and gave an example to us all of the results of a quiet and uniform and industrious life of moral and domestic virtue. His death calls upon us all to prepare for that end of life to which we must all come, and which few of us can expect to have deferred as long as it was in his case."

Judge BEEBE then spoke as follows: "Perhaps I, too, should say a word on the occasion which has called so many members of the bar together. When a boy I commenced a student's life in the office of my friend who has just sat down, and soon gained familiarity with the business in that office, and therefore with the business of this Court. And in my practice since that time I have experienced many kindnesses and often indulgence at the hands of Judge Betts. When I was a boy I always received from him treatment which gave me courage and hope, and during my long acquaintance with him there has been no jar in our friendship. I have always had the utmost respect and affection for him, and we all reverence his memory now that he is gone. Few men reached the years which he reached or the honors which he attained. He was a man of extraordinary industry, who never allowed any matter to pass before him without careful consideration, and a great many hours and years of labor were spent in elaboration, which he conscientiously believed to be his duty, for he was a man instant in season and out of season in the performance of duty. He has passed away, and it is due to us who remain to pay respect to his memory, and I again second the motion that the Court adjourn."

Judge BENEDET said: "My own relations with Judge Betts were perhaps somewhat different from those of any one present. I first began to know him as a student; my first cause I tried before him; I practiced before him as long as I continued at the bar, and when I took my seat upon the bench I was in some sense associated with him as judge. To his kindness to me as a lad, to his patience with me while at the bar, and to his uniform kindness to me while on the bench, I desire to bear my testimony, and the motion seems to me eminently proper."

Judge BLATCHFORD said: "I can add but little to what has been said. Sitting in this place as the successor of Judge Betts, and brought into intimate familiarity as I am daily with his decisions in all branches of the law administered here, I cannot but express the obligations

which both the bench and the bar are under to this distinguished judge for the light which he has shed upon the path of this Court. My acquaintance with him began some twenty years ago, and my relations with him have been intimate since then. He was always kind, encouraging, faithful, industrious, and conscientious in the discharge of every judicial duty. Of one branch of his judicial career I can speak better, perhaps, than any other person. I refer to the great services which he rendered to his country and to the law, in the prize cases which came before the Court during the late rebellion. In preparing his decisions in those cases for the press, as I did, I was amazed at the industry with which the judge, from the seventy-eighth to the eighty-second year of his life, went through the mass of papers in those cases, going over the evidence in each, digesting it and spreading it out in an opinion, so that the volume now stands for the information of all who have need of information on any branch of that subject. As it was the first great war that the country had waged, he was, as it were, treading a new path, using principles which had been already discussed, but adapting them to entirely new circumstances. And it was done with a clearness and a care which made the work a fitting close to his career. He has added to the reputation of the country by it, and I think the country owes a greater debt to him than to any other man in this branch of the law. I cordially accede to the request of the bar, and direct the Court to stand adjourned till Friday, and this motion to be entered on the minutes."

# INDEX.

## A

### ARREST.

1. Where a suit was commenced against a bankrupt in a State Court, the complaint being simply for goods sold and delivered, but, on affidavits showing a fraudulent contracting of the debt, an order of arrest was issued against him, and he was arrested:

*Held*, That the bankrupt was not exempt from such arrest, under the twenty-sixth section of the Bankruptcy Act. *Kimball's Case*, 38

2. Where a bankrupt, while on his way to the register's office, for the purpose of being examined, under an order (Form No. 45) which had been served upon him, was arrested:

*Held*, That that order was substantially a subpoena, and that the bankrupt was entitled to be considered as a witness; and, as such, and also as being a party to the bankruptcy proceedings, he was entitled to protection from arrest at the hands of any other tribunal. *id.*

3. That the Bankruptcy Court had power to give him protection, and that he must be discharged from this arrest on the ground that it was a breach of his privilege; but that, as soon as the privilege should cease, he would be liable to be rearrested. *id.*

4. Where a bankrupt was arrested on an affidavit stating that goods had been sent to him to sell on commission, which he had sold, and the proceeds of which he had failed to pay over on demand:

*Held*, That on that affidavit the claim against the bankrupt was a debt created by the defalcation of the bankrupt, while acting in a fiduciary capacity, and he was not entitled to be discharged from the arrest. *Kimball's Case*, 554

*See* BANKRUPTCY, 13, 15, 16, 17.  
PRACTICE IN BANKRUPTCY,  
17, 18.

### ASSIGNMENT.

1. Where a firm had chartered a vessel for a voyage to New Orleans, and obtained advances on the bills of lading of her cargo from T., who took them under an agreement that the cargo should be sold in New Orleans by D., and the whole proceeds remitted to T., who was to take his advances out of it and pay the rest over to the firm, and the firm, being indebted to other parties, gave them a draft on D., "payable out of proceeds of consignment" by the vessel, which draft was not accepted, but D. gave T. notice of its presentation; and where, in a suit by the owners of the vessel, to recover the charter money, an attachment was served on T., who afterward received the proceeds of the cargo from D., and claimed the right to reimburse himself therefrom for his advances, and for the amount of the draft, which he had paid after receiving such proceeds, taking a bond of indemnity:

*Held*, That the proceeds which came into T.'s hands were unincumbered by any appropriation or assignment which could bind him or them, and the surplus above his advances became subject to the attachment, and must be paid to the libellants, with costs. *Mc Loon v. Linguist*, 9

2. It is the law of the courts of the United States, that where an order is drawn, either on a general or a particular fund, it does not amount to an assignment of that part, or give a lien as against the drawee, unless he consents to the appropriation, by an acceptance of the draft, or an obligation to accept may be fairly implied. *id.*

3. An assignment in bankruptcy dissolves a previous attachment against the property of the bankrupt. *Houssenger & Zibelin's Case*, 504

Such an assignment dates back to the day of the filing of the petition, and the title of the assignee to the property vests in him as of that date, but subject to existing liens. *id.*

See BANKRUPTCY, 31.

#### ATTACHMENT.

See ASSIGNMENT.

LIEN, 9.

PRACTICE IN BANKRUPTCY, 36.

### B

#### BANKING ACT.

Where the president of a national bank, charged, as trustee, with the administration of the funds of the bank in his hands, converts them to his own use, he embezzles and abstracts them, within the fifty-fifth section of the Act of June 3d, 1864 (13 U. S. Stats. at Large, 116), and the Acts amendatory thereof, unless he shows authority for so doing. *Van Campen's Case*, 419

The making of false entries, by a clerk in the bank, by direction of the president, constitutes the president a principal in the offense of making false entries. *id.*

An intent to defraud the bank is to be inferred from the fact of embezzlement. *id.*

#### BANKRUPTCY ACT.

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#### BANKRUPTCY.

1. Where a debtor, before the passage of the Bankruptcy Act, procured a fictitious judgment to be entered in a State Court against himself, to enable him to coerce creditors who were pressing him, and, after the passage of the Act, took no steps to have it set aside, and in October, 1867, the debtor being then insolvent, execution was issued on it to a sheriff, who levied on what was substantially all the property of the debtor:

*Held*, That the inaction of the debtor, in taking no steps to set aside the fictitious judgment, and to prevent execution being issued on it, was a procuring or suffering by him of his property to be taken on legal process. *Schicks' Case*, 5

That the transaction was, in effect, within the provisions of section thirty-nine of the Bankruptcy Act, a transfer of the debtor's property with intent to delay, hinder, and defraud his creditors, and the debtor, therefore, must be adjudicated a bankrupt; but there was nothing in the adjudication to preclude



- the judgment creditor from asserting his rights, and maintaining the integrity of the judgment, if he could. *id.*
2. Where, before proceedings were taken in involuntary bankruptcy, a judgment was entered against the bankrupt in a State Court by default, on which an execution was issued and a levy made, and the bankrupt unsuccessfully endeavored to have the judgment, execution, and levy set aside, and the sheriff then advertised the property for sale, but was stopped by an injunction from the Bankruptcy Court, which injunction was, on a representation that the goods were perishable, modified so as to allow the sheriff to sell, directing him to hold the proceeds subject to the order of this court, and the sheriff sold them, and an application was then made to dissolve the injunction, there being no impeachment of the *bona fides* of the judgment, execution, and levy :  
*Held*, That the lien of the levy was preserved by the Bankruptcy Act and should be respected by this court, and that the sheriff should be directed to apply the proceeds of the property in his hands to the satisfaction of the execution, paying the overplus to the bankrupt's assignee, or, if there was no assignee, to the clerk of the court.  
*Bernstein's Case*, 44
  3. A debt to be barred by limitation so as not to be provable in Bankruptcy, as not being "due and payable" according to the nineteenth section of the Bankruptcy Act, must be shown to be barred throughout the limits of the United States. *Ray's Case*, 53
  4. Where the clerk of the Bankruptcy Court certifies, in due form, under the seal of the court, that copies of a notice for a meeting of creditors "were duly mailed to each creditor," that is sufficient evidence of what is so stated, even though it is made to appear that a notice was mailed by the clerk to one of the creditors, naming a different day from the day fixed. *Townsend's Case*, 62
  5. Where a bankrupt applied, under the 30th Rule, for an order that the costs should not exceed the sum deposited with the clerk, and, on being examined, testified to certain sums expended by him for his subsistence during the previous year, all of which were borrowed and still unpaid, but his petition contained no statement of such indebtedness :  
*Held*, That if his testimony was true, no discharge could be granted on his petition in its present condition, and his application must be denied.  
*Redfield's Case*, 71
  6. Where a suit was commenced in a State Court against a bankrupt, and the judgment was entered and execution issued, and a levy made by the sheriff before the petition in bankruptcy was filed :  
*Held*, That as the judgment was not fraudulent, the judgment creditors, by their levy, acquired a security for their debt in the property which is not invalidated by the bankruptcy act ;  
 That as it appeared that the property levied on would bring more money if sold by the assignee in bankruptcy at private sale than if sold by the sheriff under the execution, and as no objection was made by the creditors to the taking of such a course, the assignee must take the property and sell it, with leave to the judgment creditors to apply for an order directing payment of their judgment out of the proceeds. *Schnepf's Case*, 72
  7. Whether the court has power to direct an assignee to take property out of the hands of a sheriff who holds it under such a levy, except by consent—*Quere. id.*
  8. A judgment in a State Court against a bankrupt, which has been duly appealed from by him, is not a final judgment under the twenty-first section of the Bankruptcy Act. *Metcalf & Duncan's Case*, 78
  9. The prosecution of the case, under such an appeal, is forbidden to the creditor by that section, and a motion to compel the bankrupt to furnish new security on such appeal, or abandon the appeal, is embraced within that prohibition. *id.*
  10. It is no ground of objection to a discharge that a debt was created through the false and fraudulent re-

- presentations of the bankrupt. *Rathbone's Case*, 136
11. A bankrupt is bound to appear and submit to an examination, when ordered, without being paid witness' fees. *Okell's Case*, 144
12. Form No. 4 is not a special order, under section forty-seven of the Act. *Robinson's Case*, 146
13. Where a judgment by default was rendered against a bankrupt in a State Court, on a complaint which showed that the debt, which the suit was brought to recover, was contracted by fraud:  
*Held*, That the question, whether the debt represented by the judgment was created by the fraud of the bankrupt, was concluded by the judgment;  
 That, under the thirty-third section of the Bankruptcy Act, the judgment would not be affected by the discharge, any more than the debt which it represented;  
 That the bankrupt, therefore, was not exempt from arrest on an execution issued on the judgment in question. *Patterson's Case*, 155
14. Neither the discharge of the bankrupt, nor any step taken by the creditor in the course of the proceedings in bankruptcy in regard to his debt against the bankrupt, can release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise. *Levy's Case*, 169
15. The "protection" spoken of in the fourth section of the Bankruptcy Act, means protection to the bankrupt from being arrested in cases where he is not liable to arrest under the twenty-sixth section. *Glaser's Case*, 180
16. The granting of such protection is an act done "under and in virtue of the bankruptcy." So, also, is the enforcing of such protection.  
 The District Court has jurisdiction, therefore, under the first section of the Act, to enforce such protection. *id.*
17. The provisions of General Order No. 27, so far as they authorize the discharge, from arrest or imprisonment, of a bankrupt arrested on process founded on a claim provable in bankruptcy, where that claim is one from which his discharge in bankruptcy will not release him, are not warranted by the twenty-sixth section of the Act. *id.*
18. Where a firm, which owed debts which it was not able to pay, owed money to the brother of one of the partners, which they were desirous of securing to him, and the two brothers consulted a lawyer as to how that could be done, who declined to advise them both, but sent away the partner, and then in behalf of the creditor, brought suit against the firm to recover the debt, the summons being served on the creditor's brother alone, on which service judgment was entered by default against the firm, and execution was issued to the sheriff, who levied on the firm property, whereupon proceedings in involuntary bankruptcy were taken against the firm, and they were adjudged bankrupts without opposition, and, on the application of the judgment-creditor, the sheriff was directed to sell the property and retain the proceeds to abide the order of the court, and proof was ordered to be taken of the facts attending the entry of the judgment, and, on those proofs, the assignee in bankruptcy applied for an order directing the sheriff to pay to him the proceeds of the property in his hands:  
*Held*, That on the facts, the firm was insolvent, and suffered its property to be taken on legal process, with intent to give a preference to the judgment-creditor, and that he had reasonable cause to believe that the firm was insolvent, and, therefore, under the thirty-ninth section of the Bankruptcy Act, the firm had committed an act of bankruptcy, and the assignee in bankruptcy was entitled to recover back the property so taken. *Black & S. Cor's Case*, 196
19. That, as the creditor had submitted himself to the jurisdiction of the court, there was no need of an action by the assignee to recover the property, but the court would order the sheriff to pay over the proceeds to him. *id.*
20. The word "insolvency," as used in

the thirty-ninth section, has a different meaning from the word "bankruptcy," as used in the second section of the Bankruptcy Act of 1841, and means a simple inability to pay, as debts become payable. *id.*

21. If the act of a bankrupt does in fact give a preference to a creditor, it is competent to infer an intent on his part to give such preference, unless he prove to the contrary. *id.*

22. Where a petition in involuntary bankruptcy alleged that the debtor had, "in contemplation of bankruptcy," given a confession of judgment to one of his creditors, on which execution had been issued and his property taken, and that this was done with intent to give a preference to the creditor, and, on the proofs, it appeared that the confession of judgment was given, and the property levied on under execution and sold, and that the debtor was insolvent at the time, but did not contemplate bankruptcy, or know that there was such a law as the Bankruptcy law:

*Held*, That the facts made out a case against the debtor, under the thirty-ninth section of the Bankruptcy Act, of suffering his property to be taken on legal process, with intent to give a preference to the creditor in question, the debtor being at the time insolvent. *Craft's Case*, 214

23. There are four species of acts for which, when done by a person bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, with intent to give a preference to one or more of his creditors, he may be put into bankruptcy, viz.: (1.) Making a transfer of his property; (2.) Giving a warrant to confess judgment; (3.) Procuring his property to be taken on legal process; and (4.) Suffering his property to be taken on legal process. The first three require affirmative action on the part of the debtor, but the last does not. *id.*

24. Where the assets of a bankrupt consisted of an interest in certain notes, from which the assignee in bankruptcy had collected nothing for more than sixty days after the adjudication of bankruptcy:

*Held*, That, "no assets" had come to the hands of the assignee, within the meaning of section twenty-nine of the Bankruptcy Act. *Dodge's Case*, 347

25. A bankrupt had married in 1860, his wife having then no property, and having inherited none subsequently, and received none except from her husband. In 1861, he failed in business, and from that time did business as agent, first for one M., and then for his wife, in whose name he transacted an extensive business.

*Held*, That, on the facts, a house and lot which stood in the name of the bankrupt's wife, was really his property; that he had been guilty of fraud in placing his property in his wife's hands, and had willfully sworn falsely in the bankruptcy proceedings; and that a discharge must be refused. *Hill's Case*, 349

26. A creditor who has proved his debt, is subject to the jurisdiction of the Bankruptcy court without regard to his place of residence. *Kyle's Case*, 414

27. Where, after a bankrupt had filed his petition and been adjudged a bankrupt, creditors who held judgments against him, and had proved their debts in the bankruptcy proceedings, commenced a suit in a State Court against him and others, charging that certain real estate which stood in the name of the bankrupt's wife, had been bought by him and paid for with his money in fraud of his creditors, and that a trust had resulted in their favor from such purchases, and praying that their judgments might be satisfied out of such property:

*Held*, That, by proving their debts in the bankruptcy proceedings, the creditors waived all right of action against the bankrupts, on either the judgments or the original indebtedness; and that proceedings in such suit must be stayed, under the 21st section of the Bankruptcy Act. *Meyers' Case*, 424

That, if the allegations of the creditors were true, the money used by the bankrupt in the purchase of the real estate was "property conveyed by the bankrupt in fraud of his credi-

- tors," under the 14th section of the Act, and passed to the assignee in bankruptcy under that section. *id.*
28. Where attorneys of a voluntary bankrupt presented and proved a claim for legal services in preparing the petition and schedules, and advice in relation to it, and for disbursements:  
*Held*, That no part of it was a debt to be paid in full, under the twenty-eighth section of the Bankruptcy Act. *Hirschberg's Case*, 466
29. Where bankrupts, at the time of the adjudication in bankruptcy, were indebted to a bank, in which they severally owned stock, and the by-laws of the bank provided that the stock of stockholders should be liable for their debts to the bank:  
*Held*, That the bank had a lien upon the stock, and had the right to apply it toward such indebtedness, whether it was an indebtedness of the bankrupt firm, or of the individual stockholders. *Bigelow's Case*, 469
30. Where a firm executed a mortgage upon personal property in their store, to secure a debt due to one of their creditors, which mortgage was executed November 1st, 1867, and filed November 26th, 1867, and on the 2d of January, 1868, the mortgage was foreclosed and the property sold, the mortgagors having failed in business in December, 1867, and it was not alleged in the petition in involuntary bankruptcy, which was filed against the firm, that they were, when the mortgage was given, bankrupt or insolvent, or then contemplated bankruptcy or insolvency:  
*Held*, That, though the mortgage was not given for a present consideration, within the fourteenth section of the Bankruptcy Act, and although it was made with the intent to give a preference to a creditor, it was not made with intent "to delay, defraud, or hinder" the creditors of the mortgagors, within the meaning of the thirty-ninth section of that Act. *Dunham & Orr's Case*, 488
31. Where, in support of an allegation that an act of bankruptcy had been committed by the transfer of certain property by the debtors, when bankrupt or insolvent, with intent to prefer a creditor, an assignment of the property in question was offered in evidence, which had no Internal Revenue stamp upon it, and which was the only proof offered:  
*Held*, That under the one hundred and fifty-eighth section of the Internal Revenue Act of June 30th, 1864 (13 *U. S. Stat. at Large*, p. 292), the assignment was void, and the allegation of the petition in bankruptcy was not sustained. *id.*
32. An assignee in bankruptcy found that a portion of the property was subject to a chattel mortgage. He sold it all without objection from the mortgagee, and the property mortgaged did not sell for the amount of the mortgage.  
*Held*, That the mortgagee was not entitled to be paid the full amount of his mortgage as a privileged debt. *Purcell & Robinson's Case*, 485
33. Where a petition in involuntary bankruptcy alleged, as an act of bankruptcy, that the debtors had "fraudulently stopped and suspended and not resumed payment of their commercial paper for a period of fourteen days," but no facts were stated in the petition, or in the affidavit which accompanied it, to show that such stoppage, &c., were fraudulent:  
*Held*, That no order to show cause could be issued. *Cone & Morgan's Case*, 502
34. A debt fraudulently contracted is not discharged by a discharge in bankruptcy, and that the question whether such discharge affects a debt can only be raised and determined in a suit to collect the debt, in which the discharge shall have been set up as a bar to the recovery. *Wright's Case*, 509
35. Section twenty-one of the Bankruptcy Act does not apply to debts which, by section thirty-three, are excepted from the operation of a discharge. *id.*
36. A formal dissolution of a partnership will not prevent the operation of the Bankruptcy Act upon the partners, so long as there are partnership debts

and partnership assets existing.  
*James C. Jewett & Co.'s Case*, 514

37. C. & S. applied for an adjudication of bankruptcy against themselves and J. as partners. The partnership did not exist at the time the petition was filed. There were partnership debts, but no partnership assets except a claim against B. & Co., for damages arising out of their fraudulent recommendation of a person to the firm, in consequence of which the firm intrusted property to him, which he failed to account for.

*Held*, That such a claim was not within the description, in the fourteenth section of the Act, of the assets which pass to the assignee in bankruptcy, and that the petition as to J. must be dismissed with costs. *id.*

*See ARREST.*

PRACTICE IN BANKRUPTCY.

#### BILL OF LADING.

1. Where a bill of lading specified that the vessel was bound "for Catharine street, East River, New York," and also contained a clause as follows: "demurrage \$10 a day after four days," and on the arrival of the vessel at Catharine street, it was not possible to discharge her there, owing to the wharf being out of repair, and the consignee thereupon ordered her to go to Dover street, and she went and was unable to discharge her cargo, owing to there being so many vessels there that she could not get a berth, until thirteen days had elapsed; and where another bill of lading between the same parties described the boat as "bound for New York, instructions at New Brunswick," and had a similar provision as to demurrage, and the consignee sent her instructions at New Brunswick to go to Dover street, whither she went and was detained for the same cause for sixteen days; and the owners of the boats sued the consignee for demurrage, and he set up that, by usage, the clause as to demurrage meant that the boat should only be entitled to demurrage, if detained more than four days after she had got a berth:

*Held*, That where the consignee of a cargo requires it to be taken to a

particular place, he ought to be held liable for any delay caused at that place, for which the vessel cannot be shown to be directly chargeable;

That no usage ought to be allowed to vary a plain contract for demurrage, under such circumstances;

That the consignee, therefore, was bound to pay demurrage after four days from the arrival of the vessel at the specified place of delivery, with interest on it from the day when it was demanded. *Phil. & Read. R. R. Co. v. Northam*, 1

2. Where cotton was shipped at Galveston, on a vessel bound to New York, and bills of lading were given therefor, and on the voyage, the vessel was bartrously run ashore, and part of the cotton was lost, and a part of it, which had been saved in a damaged condition, was libelled for salvage, and the owners of the cotton paid the amount of salvage decreed, and libelled the vessel on the bills of lading:

*Held*, That the vessel was liable to the owners of the cotton for the value of the cotton lost, and for the injury to that which was saved, and for the money paid by them as salvage.

In case of loss or damage to goods covered by a bill of lading, the presumption of law is, that such loss or damage was occasioned by the act or default of the carrier. *The William Taber*, 829

3. Where flour was shipped on board of a vessel at New Orleans, bound for New York, by two different shippers, the flour being all branded, "Nonpareil Mills," but the two different lots having also other brands by which they were easily distinguishable, and, for one lot of 1,000 barrels, being of a better quality and a higher value than the other, which was shipped first, a bill of lading was given, in which the flour was stated to be "marked and numbered as in the margin," the entry in the margin being simply "1,000 bbls. 'Nonpareil Mills,'" and on the arrival of the ship at New York, only 439 barrels of the 1,000 were delivered to the consignee, but, all the flour marked "Nonpareil Mills" having been discharged on the dock, a portion of the 1,000 barrels was taken away by the consignee of

the other lot of flour, who was allowed to take it by the delivery clerk having charge of the delivery of the cargo:

*Held*, That the consignee of the 1,000 barrels was entitled to a delivery of the identical barrels shipped, and was entitled to a decree against the ship for the damages occasioned by the non-delivery to him of the whole number of barrels shipped to him, less the freight and primage.  
*The Ben Adams*, 445

4. Under an ordinary bill of lading, delivery on a wharf of the goods transported by the vessel is sufficient, provided due notice be given to the consignee, and provided the different consignments are properly separated, so as to be open to inspection by their respective owners, and a fair opportunity is afforded to the consignee to remove his goods. *The Santos*, 519

5. Under such a bill of lading, the carrier is responsible for the value of the goods, if he deliver them to the wrong person, even though by mistake or imposition. *id.*

6. Where a bill of lading for cotton contained the following clauses: "It is expressly understood that the articles named in this bill of lading shall be at the risk of the owner, shipper, or consignee thereof, as soon as delivered from the tackles of the steamer at her port of destination, \* \* \* and they shall be received by the consignee thereof, package by package, as so delivered, and, if not taken away the same day by him, they may (at the option of the steamer's agent) be sent to store, or permitted to lie where landed, at the expense and risk of the aforesaid owner, shipper, or consignee:"

*Held*, That such clauses were not unreasonable, and were such as a court should enforce. *id.*

7. Where 142 bales of cotton were shipped on board a vessel, under bills of lading containing the above special clauses, there being also other cotton on board, and, on the arrival of the vessel, the consignee of the 142 bales paid the freight on them, and sent carts to remove them before any of them were discharged, and all of the

142 bales were discharged from the vessel on the wharf, but thirteen of them were not received by the consignee, and it did not appear what had become of them, but, after all the other consignees had received all the cotton which they claimed, there remained on the dock thirteen bales without marks, which did not form part of the 142 bales; the cotton having been unladen bale by bale, and the mate of the vessel having tried to separate the various consignments after the bales were landed, and having required receipts to be given for all the cotton that was removed from the wharf before he would allow it to be removed:

*Held*, That the vessel was not liable for the value of the missing bales;

That the duty of the vessel, under the bill of lading, was discharged when the cotton was put on the dock;

That, under the bill of lading, the consignees, having had due previous notice, were bound to examine each bale, as it left the vessel's tackles and was deposited on the wharf, and see if it was their cotton;

That any custody or control of the cotton on the wharf which the mate assumed to exercise over it was unauthorized, and he had no right to demand a receipt before allowing it to be removed from the wharf. *id.*

8. Where a libel alleged that 303 bales of cotton were shipped on board a steamer to be carried to New York, and that a bill of lading therefor, a copy of which was attached, was signed by the agents of the vessel, and that seven of the bales were not delivered, and were not lost by perils of the sea, and the answer admitted that the vessel agreed to carry the 303 bales, and that her agents signed a bill of lading, and that a copy of it was attached to the libel, and alleged that only 273 bales were ever received on board the vessel, but that the rest were brought to New York by another vessel, and discharged upon the wharf, on due notice to the consignee:

*Held*, That on the pleadings, the authority of the agents to bind the vessel by the contract in the bill of lading must be considered as admitted;

That on the bill of lading, the bur-

den of proof was on the vessel to show that the bill of lading was signed for bales of cotton that were never received on board the vessel;

That that fact was not proved by the mere statement of the purser of the vessel, that they received 308 bales, and left 30 behind;

That there was no proof of the delivery of the seven bales at New York, and the vessel was liable for their value. *The Saragossa*, 544

## BLOCKADE.

See CHARTER-PARTY, 5.

## BOTTOMRY.

1. A master of a vessel which had sailed from Singapore, bound to Australia, barratrously ran away with the vessel to the port of Aspinwall, in New Granada. There he had made arrangements to sell the vessel and cargo, when C., the British consul, who was also Lloyd's agent there, discovered the fraud; and, by the aid of the authorities, the prosecution of the fraud was prevented, and the master absconded. The American consul thereupon appointed a new master, S., for the vessel, and directed him to bring her to New York, as the nearest proper port. C. thereupon advanced \$1,616.82 in gold, to pay bills incurred for the vessel, and took a bottomry bond, executed by S., as master, on the vessel and cargo, to secure the payment of these advances, with 40 per cent. premium. The bond also recited, that it had been agreed between S., the new master, and the United States consul and C., that C. was entitled to a reasonable sum for salvage, as a reward for his recovery of the property; and the bond then assigned the vessel and cargo to C. for the fulfillment of the contract. On the arrival of the vessel at New York, a libel was filed by C. to enforce the bond.

*Held*, That the advances were made by the libellant on the credit of the vessel and cargo, and the case was, therefore, a proper one for the giving of a bottomry bond;

That S., having been appointed master by the American consul in a foreign port, agreeably to the usage of merchants under the circumstances,

had the same authority to execute the bond as if he had been appointed directly by the owner of the vessel;

That the libellant must have a decree, therefore, for his advances and the premium, no objection being taken to the latter as excessive, but without any allowance for premium on gold;

That the libellant's claim to be recompensed for his services in detecting the fraud and recovering the property was a proper one to be allowed under the bond, not however as salvage, but *pro opere et labore*. *The Brig Jacmel Packet and Her Cargo*, 107

2. Where a British vessel, bound to New York, put into Ship Harbor, Nova Scotia, in distress, and her master, who was half owner, had her repaired; and, having no means to pay for the repairs, borrowed money at Halifax, on a bottomry of the vessel, having telegraphed to the other part owner of the vessel in Canada, but not having been able to procure the funds he needed except by the bottomry:

*Held*, That the master had the right to create a bottomry on his own interest in the vessel, without the existence of any necessity for doing so;

That as to the interest of his co-owner, it was no objection to the bottomry, that the loan was effected after the repairs were made and the supplies furnished;

That, the necessity of the repairs being shown, it was for the claimant to show that the money could have been obtained otherwise than by bottomry, if he would defend against the bond. *The Barkantine Kathleen*, 458

## CASES CRITICISED.

- Thomas v. Osborn (19 How. 22)... p. 83  
 Pratt v. Reed (*id.* 359)..... 33, 319  
 The Pacific (1 Blatch. C. C. R. 569) 295  
 Allen v. Newberry (21 How. 244)... 549  
 Maguire v. Card (*id.* 248)..... 549  
 Poag v. The McDonald..... 550

## C

## CHARTER PARTY.

1. Where a vessel was chartered in New York, for a voyage from ports in Flor-

ida to New York, and did not go to any of the ports of loading named, but returned to New York without having entered on the performance of the charter, the charter party containing a clause whereby the parties bound the vessel and the merchandize to be laden on board, each to the other, for the faithful performance of the covenants therein contained:

*Held*, That an action *in rem* against the vessel, to recover the damages occasioned to the charterer by this breach of the charter, would not lie.

Under such a charter, any duty that may be violated by the owner or master before the cargo is put on board, is not a duty of the vessel, or one for the breach of which a lien on the vessel is created or can be enforced. *The Schooner Gen. Sheridan*, 294

2. Where a steamer was chartered in New York for a voyage to Tampico and back, the charterer to appoint all the officers except the master and chief engineer, and the vessel went to Tampico, and was there sent by the charterer up the Panuco river, where she received injury, and on her return the owner filed a libel against the charterer to recover a balance of charter money, and also damages for the injury received by her, and the charterer set up, as a defence, that the vessel was chartered on representations made by the owner which were untrue:

*Held*, That on the facts the vessel was not chartered on representations, but on a full examination of her by the charterer;

That the vessel was overloaded by the charterer;

That the charterer was liable for the amount remaining due of the charter money, and also for injury received by her in going up the Panuco river, whither she was sent contrary to the charter. *Latson v. Sturm*, 327

3. Where a vessel was chartered for a voyage to the Canary Islands and back to New York, the charter providing that the charterer should furnish, as freight, at the Canary Islands, 150 tons of barilla and 20 pipes of wine, or more, and the vessel arrived at the Canary Islands and discharged her outward cargo, on which freight was

paid, and received on board 20 pipes of wine, but no barilla, although the charterer had it ready for her, because the authorities would not allow it to be put on board of her, unless she would first go to Vigo, in Spain, to quarantine, and the master refused to go to Vigo, but, after waiting the number of lay days specified, returned to New York, being obliged, for lack of the barilla, to put in at St. Thomas for ballast, and, on her arrival at New York, her owners sued the charterer to recover freight on the wine delivered, and dead freight for the 150 tons of barilla, and damages for being compelled to put in at St. Thomas:

*Held*, That, as there was in the charter no exception of restraints of princes, there was an absolute engagement on the vessel's part to receive on board the barilla, even though the authorities of the Canary Islands should prohibit its being put on board;

That, in the absence of such an exception in the charter, the vessel was in fault in not being in a condition to receive the barilla, and the vessel, and not the charterer, must bear the loss;

That the acceptance of the outward cargo, and the loading of the wine, did not excuse the failure of the vessel to put herself in a condition to receive the barilla;

That the libellant was entitled to freight on the wine brought, but the charterer was entitled to recoup against it any damages set up in the answer, which arose out of any breach of the charter party by the libellants, to the amount of such freight, but, for any claim beyond that, he must resort to his own proper action. *Holyoke v. Depew*, 334

4. Where a vessel was chartered in New York for a voyage to Kingston, Jamaica, to load with a full cargo of bamboo, in bundles of a specified size, for freight payable per bundle, and it was specified in the charter that if the charterers did not have sufficient cargo to load her at Kingston, they were to have the privilege of sending her to "a second safe port," and the vessel went to Kingston and partly loaded, and was directed to go to Port Morant to complete her loading, and the bamboo with which she was loaded at both ports was in



bundles of larger size than that specified in the charter, which the master received under protest, and the vessel, in coming out of Port Morant, owing to the land breeze dying away as she was coming out through a narrow channel (there being no tugs in the port, nor any means of getting out except the land breeze), struck on one of the reefs which form the channel, and was seriously injured, and the owners sued on the charter to recover damages sustained by the vessel and also the charter money:

*Held*, That the vessel was entitled to recover freight under the charter, at the rate specified in it, for as many bundles, of the size specified in the charter, as she could carry;

That the words "a second safe port," imply a port which this vessel could enter and depart from without legal restraint, and without incurring more than the ordinary perils of the seas; and that, on the facts, Port Morant was not such a port, and the master of the vessel would have been justified in refusing to go there;

But that, as he made no objection, but went without giving any notice of an intention to hold the charterers responsible for any injury that might arise from its unsafeness, he must be deemed to have waived the objection, and his action bound his owners, and they could not recover for the injury received by the vessel in coming out of the port. *Atkins v. The Fibre Disintegrating Co.*, 381

5. Where a vessel was chartered in New York, for a voyage to Port au Platte, St. Domingo, or, in case of that port being blockaded, to another open port in the same island, or a market, and back to New York, the vessel to use all diligence in port and at sea, and the charterer, in answer to a libel to recover the charter money, set up various delays by the vessel, one being a deviation to Turks Island, for the purpose of inquiring whether Port au Platte was blockaded:

*Held*, That the vessel would have been liable to seizure as a prize, if she had gone direct to Port au Platte for the purpose of inquiring whether the blockade of that port was raised;

That, as there was no restriction in the charter as to where the master

should make inquiry, and as Turks Island was shown to be a proper place to make such inquiry, the vessel was not chargeable with any loss occasioned by her going to Turks Island for that purpose, only the necessary time having been consumed;

That evidence of instructions from the charterer to the master of the vessel, in reference to going to Turks Island, could not affect the rights of the parties in regard to matters that were covered by the charter;

That, for delay occasioned by a mistake of the master in passing by a port, the owners of the vessel were liable. *Stokely v. Smith*, 407

## COLLISION.

### 1. STEAMERS.

1. Where a steam vessel attempted to make a landing at a pier next to a ferry slip, and backed out after having gone in bow on, and the wind and tide swept her stern toward the ferry slip, and she continued backing until she came in collision with a ferry-boat, which was coming into the slip and had slowed as soon as she saw the other steamboat backing, and had stopped and backed as soon as she had reasonable ground for apprehending a collision:

*Held*, That the ferry-boat was free from fault;

That the other steamboat was in fault in backing as she did, having no person on her after deck to look toward the direction in which she was backing. *The Baltic*, 98

2. Where a steamboat coming down the Hudson River from Albany, on rounding Magazine Point, saw the lights of a tow-boat below, which was going up on the east side of the river, and the pilot of the steamboat blew two whistles, whereupon the tow-boat answered with two whistles and starboarded her wheel, expecting that the steamboat would pass to the eastward of her, but the latter struck a barge on the port side of the tow-boat, the collision occurring about the middle of the river, and the steamboat having no lookout forward outside of the pilot house:

*Held*, That the tow-boat was right,

on hearing the two whistles of the steamboat, in starboarding her helm, and was not in fault;

That the pilot of the steamboat misjudged the position of the tow-boat, supposing she was on the west shore, instead of on the east shore, and that such mistake was the cause of the collision;

That the steamboat was also in fault in not having a proper lookout. *The St. John*, 192

3. A steam ferry-boat crossing the Hudson River, as she approached her slip on the New York side, saw a steamboat coming down the river about two hundred yards out from the piers, and blew one whistle as a signal and ported her wheel, and, as she saw that the other vessel did not change her course, blew another single whistle and kept on with unslackened speed till she was struck on the port side by the other steamboat;

The steamboat, coming down the river at the rate of twelve miles an hour, saw the ferry-boat coming, and blew two whistles, and kept on with unabated speed and without any change of course, although she saw that the ferry-boat paid no attention to her signal, until just before the collision, when her engine was stopped;

A passenger on the ferry-boat, on her way to New York to attend divine service (the day being Sunday), was severely injured by the collision:

*Held*, That both vessels were in fault;

That, when each vessel signaled, it was seen by her that there was "risk of collision," within the meaning of the 14th and 16th articles of the rules for avoiding collisions, contained in the Act of April 29th, 1864 (13 *U. S. Stat. at Large*, 60), and it was the duty of each of them to have then slowed and stopped;

That, as the vessels were crossing, it was the duty of the steamboat, having the ferry-boat on her starboard hand, to keep out of her way, according to the 14th article;

That it was the duty of the ferry-boat, under the 14th and 18th articles, to have kept her course, and she was in fault in porting her helm;

That the libellant could recover her damages against both vessels;

That the libellant was not within

the provisions of the Sunday Law of the State of New York (1 *Rev. Stat.*, part 1, chap. 20, title 8, art. 8, sec. 70);

That if she had been, it would be no defence to her right of recovery;

That, on the evidence, the libellant was entitled to recover the expenses to which she had been put in consequence of the injury, including the value of some care and service which was gratuitously bestowed on her;

That she was also entitled to recover the damages consequent on her not being able to earn so much after it as before, and also compensation for the pain and mental distress suffered by her, but nothing for exemplary or punitive damages.

Decree for libellant for \$10,000, one-half to be paid by each vessel. *The D. S. Gregory and the George Washington*, 226

4. Where a steamer was coming into New York Harbor from the sea in the day-time, having on her starboard hand a steam vessel, built for a floating grain elevator, which was crossing her path, and the latter kept her course, but was struck by the steamer, and the steamer claimed that there were vessels at anchor which prevented her from going under the stern of the elevator, the steamer's lookout having seen the latter, but not having reported her for the reason that, as he supposed, the captain and pilot, who were on the bridge, saw her:

*Held*, That, as the vessels were crossing, it was the duty of the steamer, having the elevator on the starboard side, to keep out of the way. That the failure of the lookout to report the elevator when he saw her was negligence;

That, as the steamer did not pretend that she was baffled or misled by any movement on the part of the other vessel, and her only mode of keeping out of the way of the latter was to go under her stern, she must prove that at no time after she was first near enough to have discovered the latter could she have ported and thus have avoided the collision;

That it was not proved that the steamer entered among the crowd of vessels before she ought to have discovered the elevator. *The Hansa*, 299

5. Where a steamboat was coming down the Hudson river, having boats in tow on each side, and having lights properly set, and kept close to the west bank of the channel, and, seeing the lights of an approaching tow, slowed and stopped, and the tug-boat coming up was also on the west side of the channel, and, seeing the other's lights, hauled out to the eastward, and then straightened up the river, and a collision occurred between one of the boats which she was towing astern, and the boat on the port side of the steamboat coming down :

*Held*, That there was no fault on the part of the boat that was injured ;

That the steamboat going up was in fault in not keeping to the east side of the channel, and that she either did not sheer far enough to the eastward, or straightened up the river too soon ;

That the steamboat coming down was not shown to be in fault. *The America and the New Haven*, 475

## 2. SAILING VESSELS.

6. Where the schooner E. was bound south from New York, heading S. W. by W., one point to windward of her proper course, and the schooner E. E. was bound to New York, heading N. E. by N., and the vessels came together, the E. E. striking the E. on her port bow, and each vessel claimed to have been close-hauled, and that the other had the wind free, and neither vessel showed a light, but the E. E. was seen from the E. at a much greater distance than the E. was seen, and the E. claimed that the E. E. luffed on seeing her, and thus caused the collision :

*Held*, That, on the evidence, the E. E. was close-hauled, while the E. had the wind free, and that it was, therefore, the duty of the E. E. to keep her course, and the duty of the E. to avoid her ;

That, as no light was shown by the E. till just before the collision, and the luff, which it was claimed the E. E. made, was sworn to have taken place before the light was shown, while the evidence was, that, owing to a heavy cloud rising behind the E., she was not seen at all by the E. E. till the light was shown, the alleged luff was not established ;

That the E. E. was not in fault in

not seeing the E. sooner, under the circumstances. *The Elizabeth English*, 365

7. Where a pilot boat was lying at anchor, off the Quarantine, with her sails up to dry, and a bark coming in from sea in tow of a tug was brought close to her, when the tug was stopped, but the bark kept on with the tide, and a collision occurred between her and pilot boat :

*Held*, That the collision was occasioned by the bark being brought too close to the pilot boat ;

That the pilot boat did not raise her anchor, and the effort on board of her, by porting her helm and getting up her jib, to let the bark go ahead of her, was caused by the approach of the bark, and was proper, under the circumstances. *The Emily—The Abraham Leggett*, 416

8. Where a schooner, coming into a slip, was made fast by lines to a ship, by the permission of those in charge of the ship, and thereafter the ship desired to leave the slip, and those in charge of the schooner were requested to cast off the lines, and, all parties supposing that they were cast off, the ship was hauled out by a tug, and, in being hauled out, came in contact with and injured the schooner, which collision the schooner claimed to have been caused by the ship's being allowed to fall upon the schooner with the tide, and the ship claimed to have been caused by a line which should have been cast off but was not, and which pulled the schooner toward the ship :

*Held*, That, in either case, the ship was liable for the collision. It was the duty of the moving vessel to be certain that all the lines were unfastened before she began to move. *The Thornton*, 429

## 3. STEAMER AND SAILING VESSEL.

9. A steamer steering S.  $\frac{1}{4}$  W., off Cape Hatteras, in the night, made a schooner's green light one and a half or two points on her starboard bow, and changed her course to S. S. E., which she kept for ten or twelve minutes, the position of the light remaining about the same, and then changed her course

to S., and ran on that course for fifteen minutes, the light remaining in about the same position, and the green light then went out of sight, and a red light came in view, whereupon the steamer's helm was at once ported, and her engine stopped and reversed, but too late to avoid the collision.

The schooner, sailing N. by E., with the wind S. by E., made the steamer's light directly ahead, and being uncertain whether she was a steamer or a sailing vessel, ported her helm, and changed her course to NE. by N., and kept that course till she saw that the vessel was a steamer approaching on a course which would run her down, when she put her helm hard a-port, and changed her course to E. by N.

The speed of both vessels was about six or eight miles an hour, that of the schooner being a little the greater. Each vessel had her lights properly set and burning. The schooner was struck amidships on the port side, and sunk instantly.

*Held*, That, on this state of facts, the 15th and 18th articles of the Act of April 29th, 1864, prescribed the rules for the navigation of the vessels;

That it was a fault in the schooner to port her helm when she did so first, especially when she was uncertain whether the approaching light was that of a steamer or sailing vessel;

That that fault did not contribute to the collision;

That the fact that the position of the light ahead did not change after the steamer had changed her course to the eastward, ought to have been a clear indication to her that the schooner was proceeding in such a direction as to involve a risk of collision; and, under those circumstances, it was her duty to keep out of the schooner's way;

That the steamer ought to have ported before she did, and ought to have stopped and backed before she did;

That the last change of the schooner's helm to port, being made in the heat of danger, did not cause the collision, nor was it faulty. *The Alhambra*, 158

ing S. W. by W., having proper lights set, and making no change of her course, was struck on her port side by a steamer, which came from a direction abaft the bark's beam:

*Held*, That, *prima facie*, the steamer was in fault, and the burden was on her of showing the contrary. *The Steamer Louisiana*, 371

11. Where a steamer was running seven and a half knots an hour, heading W. by N. half N., having two men on the lookout, an officer on the bridge, and two men at the wheel, and a red light suddenly came in sight, bearing two points on the starboard bow, and the helm was at once put hard a-port, and her engines were slowed, stopped, and backed, and the course of the steamer changed a point, but the officer finding that a collision was inevitable, ordered the helm hard a-starboard, with a view of lessening its effects, but, before the order could be obeyed, a collision took place with a bark, the witnesses testifying that the bark could not be seen sooner, owing to the haziness of the night, and the bark's lights being hid from view by her screens, in the direction from which the steamer approached:

*Held*, That it was sufficient to show that the steamship was in fault, that she was running seven and a half knots an hour, on a coast where vessels were numerous, in weather so thick and hazy, that a red light, which came suddenly into view, was supposed by the officer in command to be half a mile off, but was, in fact, so near, that though her engines were immediately stopped and backed, the collision occurred;

That a steamship, when approaching another vessel so as to involve risk of collision, must slacken her speed, or, if necessary, stop and reverse; but it is a fault in her to change her course, in ignorance of the true course and position of the other vessel;

That this steamship was in fault in porting her helm in ignorance of the course and position of the other vessel, and that that fault contributed to the collision;

That the bark was also in fault, when she saw the steamship, as she did, approaching in such a direction

10. Where, on a dark night, a bark, close hauled on her starboard tack, head-

that her regulation lights were not visible to the steamship, in not indicating her presence to the steamship by showing a visible light;

That the damages must, therefore, be apportioned. *id.*

12. Where a schooner, heading W. S. W. on her starboard tack, running over from the Horseshoe shoal, near Nantucket, toward the Cross-Rip Light, was struck on her starboard side by a steamer which had come up, bound E., till near the schooner, the steamer's helm having been at once ported, when the schooner was seen ahead, and kept so till the collision occurred:

*Held*, That the steamer was in fault in porting, whether it was done willfully, or in ignorance of the schooner's course, for, by that porting, she followed up the schooner and struck her;

That, on the evidence, the night was light enough to have enabled the steamer to discover the schooner sooner than she did, if a good look out had been kept, and, if it was not light enough, the steamer was running at too great speed;

That the schooner had a light set, and kept her course, and was not in fault; and that the steamer was liable for the collision. *The Western Metropolis*, 399

13. Where a brig, sailing westward, at night, and keeping her course, was struck on her starboard quarter by a steamer running S. by W.  $\frac{1}{4}$  W., at the rate of about seven or eight knots an hour, the steamer having kept a good lookout, and having, as soon as the brig was seen, no light being visible, stopped and backed her engine, and having, as soon as the course of the brig was seen, put her helm hard a starboard:

*Held*, That, on the evidence, the brig did not have burning such a green light as could be seen at the distance of two miles, and that this fault contributed to the collision;

That the burden was on the libellants, the owners of the brig, to establish that the steamer was in fault;

That it was not shown that the steamer could have seen the brig sooner;

That the speed of the steamer was not too great, as she had the right to rely on the exhibition of a light by an approaching vessel; and she was not in fault. *The Ariadne*, 472

14. Where a collision occurred after sunset between a steamer and a schooner, and the schooner, though having no lights, was seen from the steamer at a distance variously estimated by her witnesses as from three-quarters of a mile to two miles, and the steamer alleged as a defence that the schooner changed her course, and it appeared that, on seeing the alleged change of the schooner's course, the steamer's helm, which was then amidships, was ported and kept hard a-port till the collision, although the schooner was then in such a position and so far off that there was time for the steamer, by a slight change of her helm to starboard, to have avoided the collision:

*Held*, That although the schooner should have had her lights set, the absence of them did not contribute to the collision;

That the schooner's course being seen and known by the steamer, the burden of proof was on the latter to show that the schooner changed her course at such a time that the steamer could not keep out of her way;

That the porting of the steamer's helm under the circumstances was the cause of the collision, and was a fault. *The Queen*, 533

15. There is no obligation on a steamer, when there is danger of a collision with a sailing vessel, to port rather than to starboard her helm. *id.*

#### 4. VESSEL AT ANCHOR OR AT A PIER.

16. In a cause of collision against two vessels, if one of them is found to have been solely in fault, a decree may be rendered against her alone, although the libel charges the collision to have been caused by the joint negligence of both. *The E. C. Scranton and the Emerald Isle*, 25

17. Where a vessel, lying at a pier, was injured by another vessel, in an effort made by the latter to get into a berth at the next pier, by carelessness on the part of the latter:

*Held*, That the latter vessel was liable for the damage. *id.*

18. Where a harbor master had, by forgetfulness, assigned two vessels to the same berth, and both came to the place about the same time, and one, in trying to get in, was swept down by the tide, away from the berth, against a vessel lying at the next pier, and the other, coming in properly and finding the berth vacant, went into it, it being charged that, in so doing, she broke a line which the first vessel had got out, and thus caused her to drift down upon the vessel lying at the next pier:

*Held*, That the second vessel was not in fault in taking the berth, and, on the facts, was not guilty of negligence in going in. *id.*

19. No vessel can lay aside extraordinary care, where the circumstances are extraordinary, without making herself liable for any damage that ensues in consequence. *The Helen R. Cooper and the R. L. Mabey*, 67

20. Where a ship was being towed to sea by a single tug, when floating ice made the navigation difficult, and ran into a vessel lying at a pier, which she claimed was caused by the movement of a ferry-boat in suddenly crossing the bows of the tug and causing her to stop, and thus causing the ship to sheer:

*Held*, That as it appeared in evidence, that if another tug had been employed the ship could have been controlled, the failure to adopt that precaution was a fault which rendered her liable;

That the tug, having alleged acts of negligence on the part of the tow as the cause of the collision, of which she gave no evidence, must be held liable also. She was negligent in attempting to tow the ship alone, under the circumstances;

That the fact, that before setting out the tug exacted of the ship an agreement to assume all the risk, cannot relieve the tug from liability to an innocent third party. *id.*

21. Where a steamer, coming into New York harbor in a fog, was anchored, by the pilot in charge of her, about oppo-

site to the slip of a ferry, coming to anchor there because the river was full of vessels, and her position was known to those on board of a boat plying on such ferry, and she sounded her whistle at proper intervals, and rang a bell, and used all proper precautions to make her position known, and, about nine o'clock the next morning, the fog still continuing, she was run into by such ferry-boat:

*Held*, That, on the evidence, it was not a fault in the steamer, contributing to the collision, to anchor where she did, and keep her anchorage during the fog;

That the fact that the ferry-boat collided, in a fog, with a vessel at anchor, which used all proper precautions to give notice of her position, it being already known to the ferry-boat that she was at anchor there, was sufficient evidence that the speed of the ferry-boat was too great, there being no special circumstances to justify her maintaining the speed she did;

That the ferry-boat was, therefore, liable for the damages. *The D. S. Gregory*, 166

22. Where a vessel at anchor is struck by one in motion, the presumption of law is, that the collision is caused by the negligence of the latter, unless the former is anchored in an improper place. *The Beaver*, 118; *The Baltic*, 452

23. Where a brig came into New York harbor from sea, and anchored, in a strong wind and heavy sea, about 400 feet to windward of another vessel which was already at anchor, and dropped but one anchor, and was left without a sufficient watch on deck, and, the wind and sea increasing, her chain parted, and she drifted down upon the other vessel, which had paid out all the chain possible, to avoid her as she drifted, and her other anchor was not dropped till after she was afloat of the other vessel:

*Held*, That the brig was in fault in anchoring where she did, under the circumstances, and in not having a proper watch, and in not dropping a second anchor when the wind and sea increased; and that she was liable for the damages. *The Beaver*, 118

24. Where a brig lying at anchor in the East river, within the distance of sixty yards from a direct line between the landing places of one of the ferries, was run into by a ferry-boat in a fog in the early morning, the ferry-boat having previously made five trips on the ferry that morning, on which trips the light of the brig had been seen, and she had been avoided, and, on the trip in question, the ferry-boat, after starting from her slip, slowed to half speed, and ran on, looking for the brig, and, not seeing her, stopped her engine, and afterward started ahead again, and, as soon as she got way on her, shut off to half speed, and ran so till she sighted the brig at a distance of not over twenty yards, but, not being able to stop in less than thirty yards, was not then able to avoid a collision:

*Held*, That the ferry-boat was in fault in going at too great speed, and that such fault contributed to the collision;

That the brig was violating an ordinance of New York city in lying where she was, and that such violation was a fault contributing to the collision;

That, both vessels being in fault, the damages must be apportioned.  
*The Baltic*, 396

25. Inevitable accident, as respects a colliding vessel, means that such vessel has endeavored, by every means in her power, with due care and caution, and a proper display of nautical skill, to prevent the collision. *The Baltic*, 452

26. Where a vessel was lying at the end of a pier which formed one side of a ferry slip, with her stern projecting six or eight feet into the slip, and a ferry-boat coming into the slip was carried by the tide against such vessel:

*Held*, That the collision was not the result of an inevitable accident, as the ferry-boat might have gone further away from the pier;

That, as the ferry-boat chose to attempt to enter the slip, with the other vessel in the position in which she was, she must take the consequences of the contingency to which she exposed herself;

That the other vessel was also in fault, in lying with her stern projecting across the entrance to the ferry slip;

That the damages must be apportioned. *id.*

27. Where a steamship was coming into Pier 37, in the East River, in the harbor of New York, in tow of a tug, and, by the order of the pilot of the steamship, a movement of the tug was made which caused the steamship to swing against a schooner lying at the end of Pier 39, so as to crush in a canal boat which lay between the schooner and the end of that pier:

*Held*, That it was the duty of the steamship to come in at Pier 37 so as to avoid touching the vessels at Pier 39, and that she was responsible for the damage. *The Nebraska*, 500

## CONSUL.

The courts of a State have no jurisdiction of suits against foreign consuls, but have jurisdiction of suits brought by them. *Sagory v. Wisman*, 240

See *BOTTOMRY*, 1.  
*PLEADINGS*, 6.

## CORPORATION.

See *PRACTICE IN BANKRUPTCY*, 21.

## COSTS.

1. A register in bankruptcy is not entitled to five dollars upon the adjournment of an examination, as for "a day's service while actually employed under the special order of the court," where, on the application of an opposing creditor, an order has been made by the register that the bankrupt attend and be examined before him, and on the day fixed the bankrupt appeared, but the opposing creditor was not ready, and accordingly the examination was adjourned. *Clarke's Case*, 72

2. A register in bankruptcy taxed the following fees for his own services:

|                                                            |        |
|------------------------------------------------------------|--------|
| 1. Examining schedules, and certifying same correct, . . . | \$5 00 |
| 2. Certified copy of adjudication of bankruptcy, . . .     | 0 45   |
| 3. Application for first meeting of creditors, . . .       | 1 00   |

- |                                                                                                    |      |                                                                               |
|----------------------------------------------------------------------------------------------------|------|-------------------------------------------------------------------------------|
| 4. Certified list of creditors for warrant,                                                        | 0 95 | and place of its shipment. <i>The Mary J. Vaughan and the Telegraph</i> , 147 |
| 5. Supplemental warrant, \$2; application for meeting, \$1,                                        | 3 00 |                                                                               |
| 6. Certified copies schedules for assignee,                                                        | 4 45 |                                                                               |
| 7. One day's service, under special order of reference on petition for final discharge,            | 5 00 |                                                                               |
| 8. Order to show cause, and certifying copy for clerk,                                             | 1 00 |                                                                               |
| 9. Application for second and third meetings,                                                      | 2 00 |                                                                               |
| 10. Deposition of assignee on his return,                                                          | 0 65 |                                                                               |
| 11. Service under special order to show cause why bankrupt should not be discharged,               | 5 00 |                                                                               |
| 12. Second and third meetings of creditors,                                                        | 6 00 |                                                                               |
| 13. Services on examination of bankrupt and proceedings, and for making certificate of conformity, | 5 00 |                                                                               |
| 14. Discharge without opposition,                                                                  | 2 00 |                                                                               |
- On objection by the bankrupt to each of the foregoing items,  
*Held*, That the 1st, 3d, 4th, and 8th items must be disallowed.  
 That the 6th, 7th, 10th, 11th, 13th, and 14th items must be allowed.  
 That the 2d item must be reduced to 35 cents; the 5th to \$2.00, for the warrant; the 9th to \$1.00; and the 12th to \$3.00. *Robinson's Case*, 146
3. A printed paper is to be taxed for, as if it were written. *id.*
4. Where a libel for a collision failed to convey any idea of the manner in which the collision took place, but was not excepted to, and on the hearing a decree was made dismissing it:  
*Held*, That no costs would be given, because the libel should have been excepted to and dismissed. *The Warren*, 448
- See PRACTICE IN BANKRUPTCY*, 5.  
*SEAMAN'S WAGES*, 1.
- DAMAGES.**
1. The measure of damages for cargo lost by a collision, is its value at the time
2. Where cargo was put on board a canal boat, in Canada, to be carried to New York, and was lost in a collision on the Hudson River, the currency of the place of shipment being shown to be United States gold coin, and the cargo, in that coin, being shown to be worth a certain number of dollars:  
*Held*, That the decree for damages must be for that number of dollars;  
 That interest must be allowed at the rate of six per cent. per annum. *id.*
3. Where a ferry-boat was injured in a collision, and was withdrawn for repairs, her place being supplied by a boat taken off from another ferry belonging to the libellants, whose place was in its turn supplied by a spare boat, but it was not shown that the injured boat could have been chartered for any sum for the time she was so laid up, but proof was given of the value of her use, based on her receipts while running on the ferry:  
*Held*, That the use of the ferry-boat was valuable;  
 That the case of *Williamson v. Barrett* (13 How. 112), holding that the market value of a vessel is the criterion of her value in collision cases, does not apply where it appears that no such thing as a market price exists;  
 That there being no market price, a judgment as to her value, given by men having experience upon the ferries, founded upon their knowledge of the business, is the natural way to ascertain the loss. *The Cayuga*, 125
4. Where the owners of the ferry-boat repaired her themselves, and charged, in addition to the pay of the laborers, an addition of twenty-five cents a day, which was proved to be usually charged for the use of tools and yard, &c., and also made a charge for the services of two men in superintending the repairs:  
*Held*, That these items were recoverable as part of the damages. *id.*
5. Where a vessel injured by collision, was sold at auction, and afterward repaired by the buyers:



*Held*, That the damages to be allowed in an action for the collision were to be arrived at by a reference to the cost of those repairs, instead of the result of the sale;

That interest was to be allowed on the value of the cargo and freight and on the repairs. *The Empire State*, 178

6. Where, in a collision case, on contradictory evidence, the commissioner to whom it was referred to ascertain the damages, reported a certain amount as the value of the vessel that was lost:

*Held*, That though, if the question were before the court as an original one, the court would be inclined to fix a lower value, yet, as the preponderance of evidence was not palpable, the finding would not be disturbed.

Net freight only is recoverable in such a case, and not gross freight; nor can the freight allowed exceed that which was claimed in the libel.

Interest on the value of the vessel, and on the net freight, from the time of the loss, may be allowed, though it was not claimed as such in the libel. *Egbert v. The Baltimore & Ohio Railroad Company*, 223

See COLLISION, 3, 11, 24, 26.

#### DELIVERY OF CARGO.

See BILL OF LADING, 3, 4, 5, 6, 7, 8.

#### DEMURRAGE.

See BILL OF LADING, 1.

### E

#### EVIDENCE.

1. On an examination, before a United States commissioner, of a person charged with crime, his confession of the crime, without any proof of the *corpus delicti*, is sufficient to warrant his being held for trial. *The U. S. v. Bloomgart*, 356
2. On such an examination, evidence of the actual existence of a certain national bank, and of acts done by the accused as president thereof, is suffi-

cient evidence of the legal incorporation of the bank, and of the connection of the accused with it. *In the Matter of Van Campen*, 419

3. The evidence of the pilot of a steamer, who was at her helm in the night, that he saw a schooner from a quarter to a half a mile off, is more reliable than that of other witnesses, who came out suddenly into the darkness, that she could not be seen so far off. *The Western Metropolis*, 399

4. If the recorded owner of a vessel, who has sworn that he is her owner, may be allowed to take the position that he has no interest in her, it is not unreasonable to require that such position should be sustained by some other proof than the declaration of the party himself. *Casey v. Leary*, 530

5. Where, in bankruptcy proceedings before the register, one of the creditors offered evidence to show that his debt was fraudulently contracted by the bankrupt:

*Held*, That the evidence was immaterial. *Tallman's Case*, 348

See BANKRUPTCY, 31.

BILL OF LADING, 8.

IMPORT ACTS, 1, 5, 6.

### F

#### FRAUDULENT NATIONALITY.

Where a vessel was libelled for advances, and no one but a mortgagee appeared to contest the suit; and where, on the proofs, it appeared that the vessel, though nominally a British vessel and owned by a British subject, was really the property of American citizens residing in New-York, who thus sailed her under false colors, and with a fraudulent nationality, and, while they were so using her, agreed with the respondent for a loan on the security of their personal obligation and a mortgage on the vessel, to be executed by the fictitious owner, and the latter accordingly executed to the respondent the mortgage under which alone he claimed:

*Held*, That, before the English Admiralty, the claim of the mortgagees

would be rejected as founded on a sham title, created in violation of law;

That, on principles of comity, it was the duty of this court to apply the same rule;

That the transaction in question was contrary to public policy, and was not to be upheld under our own laws;

That the claim of the mortgagee, therefore, must be rejected. *The Acme*, 386

### FREIGHT.

Where the master and owner of a canal-boat, which was in Hudson, with a cargo on board, bound to Philadelphia, agreed to sell her for \$1,000, and to take on board at Philadelphia an engine belonging to the purchasers, and deliver it to them with the boat at New York, on or before a certain day, they to pay all tolls; and the vessel went to Philadelphia and took on board the engine and brought it to New York, and the owner of the boat was not then able to give the purchasers a good title to the boat, and the latter tendered the tolls and demanded the engine, which the master did not deliver, and they libelled the boat to recover its value:

*Held*, That the purchasers were not bound to pay or tender the \$1,000 till they received the boat and a good title to her, and the engine;

That any freight on the engine was part of the \$1,000;

That the purchasers, having tendered the tollage, were entitled to the engine, free of all lien for freight. *The Canal-boat Excelsior*, 434

See DAMAGES, 6.

## H

### HABEAS CORPUS AND CERTIORARI.

1. Where a party was charged, before a United States commissioner, with embezzlement of the funds of a national bank, and with having made false entries in its books, and, an examination having been had, was held for trial, and the proceedings were

brought before the court for review, by *habeas corpus* and *certiorari*:

*Held*, That the court, on such review, will examine the evidence before the commissioner, and will do what he ought to have done;

That evidence showing probable cause to believe that the accused is guilty, is sufficient to warrant his being committed for trial. *In the Matter of Van Campen*, 419

2. Where, on writs of *habeas corpus* and *certiorari* to a United States commissioner, it appeared that the commissioner had issued a warrant to arrest the petitioner, on a charge of conspiring to defraud the United States in the Eastern District of Michigan, who had been arrested and brought before him, and demanded an examination, and on the examination the evidence consisted of an indictment found against him in the Eastern District of Michigan, and proof that on that indictment the District Court of that District had issued a warrant for his arrest, the indictment averring that the prisoner, with certain others named, did, at the city of Washington, conspire, combine, confederate, and agree together to defraud the United States, in a manner particularly set forth, and that one of the parties to said conspiracy, named Lee, at Detroit, in the Eastern District of Michigan, in pursuance of said conspiracy, did do an act to effect the object of said conspiracy, said act being particularly set forth, and on such proof the commissioner committed the prisoner for trial in the Eastern District of Michigan, and thereupon this *habeas corpus* was issued, and the discharge of the prisoner claimed, on the sole ground that the indictment produced did not aver that an offence against the United States had been committed in the Eastern District of Michigan:

*Held*, That the question whether the indictment sufficiently averred an offence committed in the Eastern District of Michigan should not be prejudged on a proceeding like this;

That on such a proceeding the indictment must be considered sufficient, unless it be so defective in its material averments that it would be the manifest duty of a court, before which

it was presented by a grand jury, to decline to take action upon it;

That this indictment was not of that character.

Whether, in such a proceeding before a Commissioner, such an indictment can be examined, and its sufficiency passed upon—*quære*. In the *Matter of Beverly Clark*, 540

## I

### IMPORT ACTS,

1. Revenue laws are not penal in the sense that requires them to be construed with great strictness in favor of defendants.

There cannot be a reappraisement, on appeal, of imported goods, unless there has been an entry of the goods.

Therefore, where, on the trial of an action to forfeit goods for an alleged undervaluation, no invoice or entry of the goods was proved, but it appeared that papers purporting to be an invoice and entry had been in the possession of the District Attorney, but had disappeared, and it also appeared that the goods had been appraised at the Custom House, but the papers on such appraisement had also disappeared, and that an appeal was taken from that appraisement, on which appeal a reappraisement was had, the papers on which were proved:

*Held*, That it was not error for the court to tell the jury that they had a right to presume from the evidence, that there was an entry of the goods. *Twenty-eight Cases, Marked M. & B., Containing Wine*, 63

2. Under the Act of March 3d, 1863 (12 *U. S. Stat. at Large*, 737), the invoice of goods imported, which are procured otherwise than by purchase, must state their actual market value at the time and place, when and where, they are procured and manufactured. 1209 *Quarter Casks, &c., of Sherry Wine*, 249
3. Actual market value is the price at which the owner or the manufacturer of goods holds them for sale, in the ordinary course of trade. *id.*
4. Where, in an action to forfeit, for un-

dervaluation, certain importations of sherry wine, from Cadiz, which had been invoiced at \$16 a quarter cask of 40 gallons, it appeared that agents in New York received, and sent to the manufacturers at Cadiz, orders for the wines, and delivered them on the wharf in New York, free of duty, at \$1.10 a gallon, effecting insurances on them in New York at the higher value:

*Held*, That if the jury were satisfied that this course of business was adopted for the purpose of concealing the real prices of the wines at Cadiz, they would be authorized to find that the sales upon such orders were sales at Cadiz prices, and that such sales might be considered in determining what was the actual market value at Cadiz, and the jury might consider the rate of insurance in determining that question; but if they found that this course of business was not adopted for that purpose, then such sales were not to be considered, because they would then be sales at New York prices, and, in the latter case, the rate of insurance was immaterial;

That if the jury found that the invoice value was below the market value at Cadiz, they must then consider whether that undervaluation was either made "with intent to defraud the revenue," as is said in the Act of May 28th, 1830 (4 *U. S. Stat. at Large*, 409), or made "knowingly," as is said in the Act of March 3d, 1863 (12 *Id.* 737);

That there is no real difference in meaning between these two expressions.

That evidence given to show the value of certain wine, previously sent to this country by the same manufacturers, and not under seizure in this case, was only to be considered in determining the question of intent;

That evidence as to the cost of manufacturing a part of the wines, called Burgundy Port, might be considered by the jury in determining its market value in Cadiz, no evidence of sales in Cadiz of wines of a similar quality having been given; but that similar evidence as to the cost of manufacture of the sherries, was not to be considered on the question of the market value of the sherries;

That the jury must be satisfied, before they could forfeit the wines, that there was a guilty knowledge, on the part of the manufacturers, that the wines were undervalued; and that "guilty knowledge" means no more than "knowledge;"

That the record of the appraisalment and reappraisement of these wines at the custom house in New York, previous to their seizure, was to be taken into consideration on the question of the market value of the wines at Cadiz, but was not the highest evidence on that question. *id.*

5. Where letters purporting to contain propositions for the purchase of wines, were received by the manufacturers abroad, and in reply they named their prices for wines for export for cash:

*Held*, That if the manufacturers believed that the letters contained regular mercantile propositions, and answered the letters and gave the prices on that supposition, the jury might infer that they would have sold the same wines to any body at the same prices, and that there was a market value thus made and fixed by them; that it was a question for the jury whether the manufacturers believed that the letters contained real proposals or not; and that, if they did so believe, it made no difference whether the proposals in the letters were in fact real or not. *id.*

6. The appraisalment and reappraisement of goods imported is not conclusive as to their market value, upon either the Government or the claimants. *id.*
7. The policy of the law allows the seizure, under certain circumstances, of the books and papers of parties suspected of being concerned in frauds upon the revenue, and also sanctions the employment of informers, and gives them a share of the proceeds of property seized, and that policy should not be inveighed against, to influence the minds of the jury. *id.*
8. Where probable cause is shown for the forfeiture of imported goods, the burden of proof is upon the claimants to show their innocence. *id.*

9. Telegraph cable, composed of iron-wire and gutta-percha, iron being the material of chief value, is embraced in the words of the twenty-second section of the Tariff Act of March 2d, 1861 (12 *U. S. Stat.* 192), and the thirteenth section of the Act of July 14th, 1862 (*Id.* 557), as a manufacture, not otherwise provided for, of which iron is the component material of chief value.

It is, therefore, not embraced within the provision of the twentieth section of the Act of August 30th, 1842 (5 *U. S. Stat.* 565), which provides, that, on non-enumerated articles, manufactured from different materials, the highest duty shall be assessed which is chargeable upon any of their component parts.

Such telegraph cable, therefore, was held to be chargeable with thirty-five per cent. duty, notwithstanding the fact that gutta-percha was chargeable with forty per cent. *The United States v. The United States Telegraph Company*, 362

10. Under the twenty-third section of the tariff Act of March 2d, 1861 (12 *U. S. Stat. at Large*, 193, 195), goats' hair, uncleaned and unmanufactured, is exempt from duty, notwithstanding the provisions of the fourth section of the Act of June 30th, 1866 (13 *Id.* 205). *51 Bales of Goats' Hair*, 479

## INDICTMENT.

*See HABEAS CORPUS*, 2.

## INFORMER.

Where C., being advised that whiskey was being taken from a distillery without payment of tax, went to the District Attorney of the United States, and stated the facts in general, without naming any place, and afterward procured and gave to the District Attorney an affidavit, made by T., setting forth certain specific violations of law, and T. afterward made an affidavit contradicting his first one, and alleging that he was drunk when he made it, and made it from purposes of revenge, and the property was afterward seized, and a libel filed to condemn it, and R., a special revenue agent, being directed to examine into the case, found conclusive evidence of

entirely different frauds, whereupon the property was condemned:

*Held*, That, under § 179 of the Internal Revenue Act of June 30th, 1864, as amended by the Act of July 13th, 1866, § 179, C. was not entitled to the informer's share, and R. was entitled to it;

That, as between C. and T., the latter would be entitled to the informer's share.

It is not the one who gives information which leads to the seizure of property, but the person who gives information of the cause which leads to its condemnation, who is entitled to the informer's share. *One Hundred Barrels of Whiskey, &c.*, 14

#### INTERNAL REVENUE ACTS.

1. Where property was seized as forfeited for an alleged violation of the Internal Revenue Law, and the claimant applied for a delivery to him of the same upon a bond:

*Held*, That as the application was one for a favor, terms might be imposed. *A Lot of Leaf Tobacco, &c.*, 76

2. That the property might be delivered to the claimant, on his giving stipulations in the appraised value of the property, less the amount of tax due on it, paying this latter amount in money into the registry of the court. *id.*

3. Where distillery property is libelled for alleged violation of the Internal Revenue Laws, the rule of the court is not to allow it to be bonded where there is reasonable ground, on the evidence, to believe that the law has been violated. *A Quantity of Distilled Spirits, &c.*, found at No. 415 East Forty-fifth street, 101

4. Where it appeared, plainly, that a rectifying establishment and a distillery were situated close together, and that appliances existed by means of which spirits could easily be run into the rectifying establishment from the distillery in fraud of the law, and there was some evidence that that had been done, the motion to bond was denied, notwithstanding the positive affidavits of the claimant and his foreman and his workmen, that it had not been done. *id.*

5. On such an application, the Government is not bound to furnish the details of its evidence, any further than is necessary to show reasonable and probable ground to sustain the prosecution. *id.*

6. Where a manufacturer of vinegar, in good faith, used a "Faubert's Patent Vinegar Apparatus," in which a mash, fermented in the same way as for the production of whiskey, was used, and, by the application of heat, alcoholic vapor was produced, which passed directly into a chamber, where it was condensed by cold water and vinegar, and the mixture, passing thence to standards, was there oxidized, and thence flowed out in the form of vinegar—alcohol, as known in commerce, being present at no stage of the process:

*Held*, That the manufacturer was not a distiller within the meaning of the sixteenth section of the Act of March 2d, 1867 (14 U. S. Stat. 481), and the apparatus was not liable to forfeiture for non-payment by him of the special tax imposed on distillers;

That the mixture was not a "product of distillation" under the Joint Resolution of February 5th, 1864 (14 Id., p. 566.) *One Vaporizer, &c.*, 438

7. Where the defendants had been indicted under the twenty-third section of the Internal Revenue Act of July 13th, 1866, for knowingly carrying on the business of a distiller on June 22d, 1867, without having paid the special tax, on which indictment they were tried and acquitted, the ground of the acquittal being that they were not the principals who were bound to pay the tax, and were afterward indicted under the twenty-fifth section of the same Act, for knowingly using a still for the purpose of distilling, in a certain dwelling-house, on June 22d, 1867, the evidence on the trial of the first indictment showing that the place of the offence charged was this same dwelling-house:

*Held*, That a plea of *autrefois acquit*, founded on the acquittal under the first indictment, could not be sustained;

That the tests as to whether such a plea can be sustained are, whether the defendants could, under the earlier in-

dictment, have been convicted of the offence embraced in the later one, and whether the evidence necessary to support the later indictment was sufficient to produce a legal conviction on the earlier one. *The United States v. Christopher Flecke, John Flecke and Henry Hildebrand*, 456

8. Where property was seized as forfeited for an alleged violation of the Internal Revenue Law, and, in the suit brought to enforce the forfeiture, a motion had been made to bond the property, which had been denied, and thereupon a mortgagee intervened, and made an application on his own behalf to bond the property:

*Held*, That the mortgagee stood in no better position, in relation to the alleged forfeiture, than the mortgagor;

That it was the thing itself which was forfeited by the statute in question, and not the right, title, and interest of the mortgagor;

That the motion must, therefore, be denied. *England & Evans Distillery*, 486

See BANKRUPTCY, 31.  
INFORMER.

## J

### JUDGMENT.

*Bona fide* judgments entered against a bankrupt before a petition in bankruptcy is filed against him are liens on the real estate of the bankrupts, as against the assignee in bankruptcy, and come within the saving clauses of sections fourteen and twenty of the Bankruptcy Act. *Smith & Smith's Case*, 432

See BANKRUPTCY, 1, 2, 6, 8, 13,  
18, 22, 27.

### JURISDICTION.

See BANKRUPTCY, 16.  
CONSUL.  
PLEADING, 6.  
TOW-BOAT.  
UNITED STATES OFFICER, 1.

## L

### LEVY.

The receipt by a sheriff of a second execution after a levy made, operates as a constructive levy under the second execution, and an actual levy under it is unnecessary. *Smith & Smith's Case*, 432

### LIEN.

1. Where the libellant furnished a mast for a foreign vessel in the port of New York, supposing that the master of the vessel was ordering it for the vessel, and rendered a bill against the vessel and owners on the same day that he furnished it, but had made no inquiry and received no information as to whether the vessel needed the mast, or as to whether the master had means or credit, or as to whether it was necessary for him to obtain it on the credit of the vessel; and where it appeared that the master had at the time means to pay for the mast, and had contracted with parties other than the libellant to furnish the mast, and actually paid them for it on the day it was put into the vessel:

*Held*, That there was neither a real nor an apparent necessity for pledging the credit of the vessel, and that the libellant, therefore, had no lien on the vessel;

That the twelfth Admiralty Rule of the Supreme Court was only intended to regulate the practice of joining ship, freight, owner, and master in one suit; and that the question of the right to sue ship, or freight, or master, or owner, for supplies or repairs, does not depend on the twelfth Rule, but on the general Admiralty and Maritime Law. *The Eledona*, 31

2. The fact that a vessel which is repaired or supplied is not in her home port, in the absence of other circumstances, makes a case of apparent necessity for the credit of the vessel.

This apparent necessity may be dispelled by proof of other circumstances, showing that the necessity for the credit did not exist, and did not appear to the material man to exist, at the time of his employment.

An agreement for delay of payment,

in most cases, is additional evidence of the existence of an apparent necessity for the credit of the vessel.

An agreement to do the work on the personal credit of an agent of the vessel, would be sufficient to defeat the claim of the material man against the vessel.

The existence of such an agreement is a fact which must be clearly proved. *The Washington Irving*, 818

3. Where the agent of a vessel, some months after repairs were done on her, and after part payment, gave a draft on a third party for the remainder, which was never paid or accepted, and was surrendered on the trial:

*Held*, That that did not amount to payment, nor did it go to show that the agreement for the work looked to the personal credit of the agent alone. *id.*

4. In an action against a vessel for supplies furnished to her in a foreign port, where the libel alleged that they were furnished on her credit, and the answer denied that they were furnished on the request of the owner, or the credit of the vessel, and averred that the owner was in good credit in the foreign port:

*Held*, That the admission that the vessel was in a foreign port, was an admission of an apparent necessity for the credit of the vessel;

That, on the pleadings, the only question was whether the supplies were furnished. *The Washington Irving*, 823

5. Where repairs were furnished in April, 1866, at New Brunswick, N. J., to a canal-boat, whose owner resided at Albany, N. Y.; and no steps were taken to enforce a lien upon the boat for the repairs until August, 1867, although the vessel was several times at New Brunswick in the intervening period; and where the then owner, after the repairs were made, had mortgaged the boat, and she was sold, under that mortgage, to a *bona fide* purchaser, who claimed her in the suit brought to enforce the material-man's lien:

*Held*, That the lien had been lost by the failure of the libellant to enforce it for so long a period. *The John Lowe*, 394

6. Where articles are furnished toward the building of a vessel, no lien for their value is given by the general maritime law. *The Antelope*, 405

7. Where a vessel was built at Newburgh, New York, in 1855, and articles were furnished by the libellant there for such building, and the vessel left Newburgh and went to New York city, and the libellant then filed his libel, in 1855, to recover the value of the articles:

*Held*, That he had no lien under the lien law then in force in the State, because he had not filed specifications of his lien within twelve days after the vessel left the port of Newburgh, as was required by such lien law;

That he had no lien otherwise, and the libel must be dismissed. *id.*

8. Where a vessel had been libelled by an owner of cargo, shipped on board and sold by her master for the necessities of the vessel, and was condemned by default and sold, and the proceeds were insufficient to pay the libellant's claim, and thereafter a material-man, who had furnished supplies to the vessel before the sale of the cargo, applied to stay proceedings and open the default as to him:

*Held*, That the lien for the cargo sold was prior to that for the materials previously furnished;

That the owner of the cargo, therefore, ought not to be put to the expense of contesting the material-man's claim, and that the petition must be denied. *The Proceeds of the Grapeshot*, 527

9. A sheriff has a lien on property covered by an assignment in bankruptcy, for fees under an attachment previously issued and served up to the date of the assignment, but no farther. *Houssenger & Zibelin's Case*, 504

*See* ASSIGNMENT, 2, 3.  
CHARTER PARTY, 1.  
FREIGHT.  
SALVAGE, 1.

## M

### MARKET VALUE.

*See* DAMAGES, 3.  
IMPORT ACTS, 2, 3, 4.

## MASTER.

*See* BOTTOMRY, 1, 2.  
LIEN, 5.

## MORTGAGE.

A strict foreclosure of a mortgage is a payment of the debt. *Sagory v. Wissman*, 240

*See* BANKRUPTCY, 30.  
FRAUDULENT NATIONALITY.  
INTERNAL REVENUE ACTS, 7.  
PRACTICE IN ADMIRALTY, 7.

## P

## PARTIES.

The only parties to bankrupt proceedings are the bankrupt and the creditors. *Fredenberg's Case*, 133

*See* PRACTICE IN ADMIRALTY, 3.

## PASSENGER ACT.

The provisions of the second section of the Passenger Act of March 3d, 1855 (10 *U. S. Stat. at Large*, 715), do not apply to steamships. *The Manhattan*, 88

## PAYMENT.

*See* LIEN, 3.  
PLEADING, 6.

## PLEADING.

1. Specifications of opposition to a discharge, under section thirty-one of the Bankruptcy Act, and General Order No. 24, must be as specific as the grounds for avoiding a discharge after it is granted, required by section thirty-four of the Act. The allegations must be allegations of fact, and must be distinct, precise, and specific, so as to advise the bankrupt what facts he must be prepared to meet and resist. *Rathbone's Case*, 138
2. An allegation that a statement in one of the bankrupt's schedules was false is insufficient. Such a statement must be willfully false to afford ground of objection. *id.*
3. An allegation that the bankrupt falsely testified as to a certain matter on his examination is insufficient, if it

does not aver that the false swearing was willful, and that the fact was a material one. *id.*

4. An allegation that the bankrupt "is entitled" to certain real estate is a sufficient specification to show that the bankrupt has been guilty, under section twenty-nine, of negligence in delivering to the assignee property belonging to him. *id.*
5. Where a petition in involuntary bankruptcy alleged that the debtor had, "in contemplation of bankruptcy," given a confession of judgment, but it did not allege that the act was done when the debtor was insolvent, an adjudication could not be made upon it as it stood, but inasmuch as the fact that he was insolvent appeared, and there was no surprise on the debtor, the case was a proper one for an amendment of the petition in that particular. *Craft's Case*, 214
6. Where a suit at common law was brought against the defendant, a foreign consul, the declaration being in debt, on a bond for \$40,000 executed by the defendant to the plaintiff, September 30th, 1851; and the defendant's plea set up that the bond was secured by a mortgage on lands in Virginia, conditioned that, if the bond were not paid, the plaintiff might enter into the lands and sell them, and retain his debt out of the proceeds, and that, on the 6th of April, 1858, after the debt became due, the plaintiff did enter on the lands, they exceeding in value the amount of the debt, to sell and dispose of them, and that he might have sold and disposed of them, and paid his debt, but, instead of so doing, he had remained in possession, whereby the debt was paid and satisfied; and the plaintiff replied to the plea, setting up that the defendant, on the 4th of July, 1855, filed a bill in Chancery, in a State Court in Virginia, against the Buckingham Gold Company, alleging that he, as owner of the lands subject to the mortgage, had contracted to sell the lands to them, and they had taken possession, but had not paid the price, and praying a sale of the lands by decree of the court, and afterward filed a supplemental bill against the



plaintiff, praying that he might be made a party, and that afterward, in June, 1857, after default in the payment of the mortgage, the plaintiff filed a bill, in the nature of a cross-bill in chancery, in the same court, against the defendant and others, for the purpose of selling the premises to pay the debt, and the defendant appeared and answered the bill, and afterward the bills came on to be heard together, and the court made a decree of sale, under which the lands were sold to the plaintiff, leaving a deficiency of \$18,399, and that the plaintiff's entry into the land was under that sale, and not otherwise; and the defendant rejoined, (1.) That the court in Virginia had no jurisdiction of the cause, inasmuch as the defendant was a foreign consul; and, (2.) That the plaintiff's bill in that court was not a cross-bill; and the plaintiff demurred to the rejoinder:

*Held*, That the court of Virginia had jurisdiction of the suit brought by the defendant; but that the suit brought there by the plaintiff was not a part of the defendant's suit, but was an original suit, and therefore not within the jurisdiction of that court;

That the first rejoinder was therefore good;

That the second rejoinder was bad, it averring that the bill of the plaintiff was not a cross-bill, whereas the replication averred that the bill was in the nature of a cross-bill;

That a strict foreclosure of a mortgage is a payment of the debt, but the entry alleged in the defendant's plea was not a strict foreclosure, but an entry to sell and pay the plaintiff's debt; and such an entry was no defence to the bond;

That the defendant's plea was, therefore, bad; and that, although the plaintiff had replied to it, the defect was not cured thereby, and the plaintiff was, therefore, entitled to judgment. *Sagory v. Wisman, Administrator, &c.*, 240

7. Specifications of opposition to a bankrupt's discharge were filed, which stated that he had concealed part of his estate, and had not delivered all his property to the assignee, and had made a transfer of part of his property

to prevent its coming into the hands of the assignee:

*Held*, That they were too vague, and should have specified the property. *Mawson's Case*, 332

8. A specification stated that the bankrupt had procured the assent of certain named creditors to his discharge, but did not state that such assent was procured by a pecuniary consideration or obligation.

*Held*, That it was insufficient. *id.*

9. The same specification stated that the bankrupt had influenced the action of "the said creditors," since the filing of his petition, by a pecuniary consideration and obligation:

*Held*, That it was sufficient. *id.*

*See* BILL OF LADING, 8.

COLLISION, 16.

CONSUL, 1.

COSTS, 4.

INTERNAL REVENUE ACTS, 6.

LIEN, 4.

PRACTICE IN ADMIRALTY, 5.

" BANKRUPTCY, 13,

14, 22, 23, 37.

SEAMAN'S WAGES, 3.

## PORT.

*See* CHARTER PARTY, 4.

## POWER OF THE COURT.

1. The court has power, if a bankrupt is arrested in violation of the twenty-sixth section of the Act, to release him from imprisonment, by *habeas corpus*, under the Act of February 5th, 1867 (14 U. S. Stat. at Large, 385). *Glaser's Case*, 180
2. Whether a Bankruptcy Court has power to enforce the protection of the bankrupt against suits pending outside of the district, and brought by parties residing and being outside of the district, or how obedience to its orders is to be enforced outside of the district, *Quere & Hirsch's Case*, 494
3. Where bankruptcy proceedings had been commenced and were pending in Louisiana, and, thereafter, a suit was commenced against the bankrupts, in a court of the State of New York, to collect a debt provable in bankruptcy,

and the bankrupts applied to this court, on petition, for an injunction staying proceedings in that suit until the close of the bankruptcy proceedings in Louisiana:

*Held*, That a District Court of the United States had no power to grant such relief, independently of the Bankruptcy Act:

That no such power was conferred on any District Court, by the Bankruptcy Act, except that one in which the bankruptcy proceedings were pending. *Richardson's Case*, 517

See ARREST, 3.

PRACTICE IN BANKRUPTCY, 17.

## PRACTICE.

### 1. IN ADMIRALTY.

1. The proceedings, on a reference to a commissioner to compute damages, are to be conducted in the usual manner in which they are conducted before a referee or a master in chancery. *The Ship E. C. Scranton*, 81

2. Where, on such a reference, the libellant was examined and partially cross-examined, and the libellant's counsel, claiming that the cross-examination had been closed, refused to produce the libellant for further cross-examination, and thereupon the claimants applied to the court for an order staying all proceedings before the commissioner until the libellant was so produced, but it did not appear that the matter had been in any way brought up before the commissioner:

*Held*, That where important questions as to leading principles arise on a reference, it is proper practice for the commissioner to apply to the court for directions, but this is always to be done on his certificate;

That where a commissioner is proceeding irregularly, or refuses to allow necessary testimony to be taken, it is proper to apply to the court, on a certificate from the commissioner as to his proceedings, for relief;

That it is not proper to make such application to the court unless the question is one on which the commissioner has passed one way or another, or has refused to pass;

That, as there was here no certificate from the commissioner as to his pro-

ceedings, and it appeared that he had not passed upon the matter, the motion would be denied. *id.*

3. A suit to recover damages for a collision cannot properly be brought against a vessel *in rem*, and her owner *in personam*, unless her owner is also master.

All the owners of a vessel injured by a collision should be joined as libellants. *The Propeller Richard Doane*, 111

4. Where an application was made for a commission to examine a witness in the East Indies, it appearing that no one was known who could be named as commissioner, except the wife of the witness, she was named as commissioner. *The Ship Norway*, 121

5. Where a libel had been dismissed on exception, but leave had been given to amend, and a new libel was filed setting out a valid cause of action, but adding a second cause of action, which was substantially a repetition of the first libel which had been dismissed:

*Held*, That this was an irregular and improper mode of pleading, and the libel must be dismissed, as not within the spirit of the order giving leave to amend. *The Circassian*, 171

6. Where a possessory libel was filed by one B., claiming to be the owner of a propeller, and that she had been taken from him by H. and others, and process was issued against the propeller, and against such persons, under which process the marshal, on March 2d, 1868, took possession of the vessel, taking her by force from the representative of H. and the others, who claimed to hold her by bills of sale and mortgages, and, on March 10th, no appearance having been entered in the cause, the libellant discontinued the suit, and the clerk of the court notified the marshal to discharge the vessel from custody, whereupon the marshal withdrew from the vessel, and B., who had been allowed by the marshal to come on board the vessel, took possession of her, and took her out of the district, and thereafter H. and the others presented a petition to the court praying that the

marshal might be directed to restore the vessel to the petitioners, from whom he had taken her:

*Held*, That, the suit having been discontinued, the court had no longer any possession of the vessel, or jurisdiction of the suit, or power to grant the relief prayed for. *The Propeller Jack Jewett*, 358

7. Where a libel was filed against a vessel to recover advances made in a foreign port, on the request of her master, for the purpose of paying off a bottomry bond, and on the return of the process no owner appeared for her, but a mortgagee appeared, and, on his consent, the vessel was sold under a *venditioni exponas*, and the proceeds paid into court, and thereupon the mortgagee filed a claim and answer, not only joining issue with the allegations of the libel, but setting up his claim as mortgagee, and praying that his claim be paid out of the proceeds, which were insufficient to satisfy both claims:

*Held*, That the proceeding had been made one to effect the proper distribution of the proceeds of a vessel, already condemned and sold at the suit of the libellant, and it was, therefore, subject to the considerations which control Courts of Admiralty in the distribution of money in the registry. *The Bark Acme*, 386

See CHARTER PARTY, 3.

COSTS, 4.

LIEN, 1, 8.

## 2. IN BANKRUPTCY.

8. Before a creditor can, under the twenty-sixth section of that Act, apply for an order to examine the bankrupt, he must prove his claim; but, under the twenty-second section, a creditor who has tendered proof of a debt, which has not been allowed, may also apply for such examination. *Ray's Case*, 53
9. No order of court is necessary to authorize the assignee to sell unencumbered assets of the bankrupt. *White & May's Case*, 85
10. If a creditor opposes a bankrupt's discharge, the register must make a certificate of his proceedings, and re-

turn the papers into court. *Hughes' Case*, 85

11. An assignee must make his return, Form No. 35, when requested by the bankrupt, when he has not received or paid any money for the estate, even though he has reason to expect that he shall thereafter receive money on that account. *id.*

12. Where an assignee examines a bankrupt, under the twenty-sixth section of the Bankruptcy Act, the assignee must pay the register's fees, whether he has assets of the bankrupt or not.

If the examination is for the benefit of creditors, the expenses of it must be advanced or secured, under the twenty-eighth section of the Act, by the creditors.

If the examination is one of the steps preliminary to the bankrupt's discharge, the expenses must be advanced or secured by the bankrupt.

These expenses do not include any compensation to the assignee. Provision may be made for securing such compensation to him. *id.*

13. Where one member of a firm alone filed his petition in bankruptcy, individually and as a member of the firm, and the register adjudged him a bankrupt individually and as a member of the firm, and also adjudged the firm a bankrupt:

*Held*, That this latter action of the register was erroneous. In such a case, notice of the filing of the petition must be given to those members of the firm who have not joined in it, or assented to it, as if the proceedings were involuntary against the firm. *Lewis's Case*, 96

14. Where, afterward, the other member of the firm presented a petition praying that both of them might be adjudged bankrupts, and that he might have leave to join in the first petition:

*Held*, That this petition might be taken as expressing the assent of the petitioner to the petition of the other partner, and to validate the adjudication of bankruptcy against the firm;

That it was not necessary for him to otherwise join in the first petition. The proceedings as to his individual creditors would be had under his pe-

tion, and the proceedings as to the individual creditors of the other partner, and as to the creditors of the firm, would take place under the first petition. *id.*

15. Applications by assignees in bankruptcy to settle controversies under the seventeenth section of the Bankruptcy Act, or to sell property under the twenty-fifth section, must be made to the court, and not to a register. *Graves' Case*, 100

16. It is incumbent upon registers in no manner to interfere with or influence, directly or indirectly, the choice of an assignee by creditors. *Smith's Case*, 118

The policy of the Bankruptcy Act is to give to the creditors, in the first instance, a free, deliberate, unbiased, choice of the assignee. *id.*

17. Where creditors applied to have the proceedings sent before another register than the one to whom the case had been referred, on the ground that the register had interfered in choice of an assignee, the court granted the application, without, however, questioning the motives of the register in what he had done, but because the creditors, who had made affidavits in support of the application, and their attorney, ought not to be compelled by the court, after all that had transpired, to continue the proceedings before the register in question. *id.*

18. Where creditors, who had proved their debts, served on the register a notice protesting against the proof of any claims against the estate by certain other creditors, and requesting to be notified if any such claims were tendered for proof:

*Held*, That they had the right to serve such a notice. *id.*

19. Where the bankrupts were examined by the assignees, and creditors filed specifications of opposition, which the court held irregular in form; and allowed them time to file new ones, and in the interim they applied for an order that the bankrupts attend and be examined under section twenty-six

of the act, several months having elapsed since the proofs of the creditors' debts, and no reason for requiring a new examination being shown:

*Held*, That the application must be denied. *Isidor & Blumenthal's Case*, 123

20. Where a witness, called for examination under the twenty-sixth section of the Bankruptcy Act, objected to being examined, on the ground that there was no authority to examine a witness under the Act unless there was a question in controversy to be settled by testimony, and not until after the examination of the bankrupt himself, but, without insisting on the objection, submitted to an examination, and the register certified the question, involved in his objection, to the court:

*Held*, That the objection was frivolous;

That, after the witness had waived his objection, there was no question to question to be certified, and the register should have refused to give a certificate. *Fredenberg's Case*, 133

21. Where specifications of objection to a bankrupt's discharge state that he has placed his property in the hands of his wife, and withheld his books, papers, and documents, they will be held too general, unless they are intended to apply to all his property and all his books, papers, and documents.

A general charge of fraud against the Act is too vague. *Hill's Case*, 136

After specifications of objection are filed, further proof may be taken, if desired, by a reference to the register. *id.*

The issues to be tried in such case are the allegations in the specifications; and, where the bankrupt has taken the oath required by section twenty-nine of the Act, the burden of proof is on the creditor to show that the bankrupt has forfeited his title to a discharge. *id.*

22. Specifications of objections to a discharge must not be vague and general. If they are such, they furnish no

ground for refusing a discharge.  
*Son's Case*, 153

23. The pendency of an examination of the bankrupt is good cause for an adjournment of the proceedings, on the order to show cause why the bankrupt should not be discharged. *Thompson's Case*, 166

24. Creditors who desire to oppose a bankrupt's discharge must prove their claims. *Levy's Case*, 169

25. Where a bankrupt was arrested in an action in a State court on allegations of fraud in contracting the debt, to recover which the action was brought, and gave bail, and applied to this court, on affidavits denying the allegations of fraud, for an order discharging him from arrest, and discharging the bail:

*Held*, That the court was competent to give him the relief sought, provided his arrest was founded on a debt from which his discharge in bankruptcy would release him.

That the court must inquire into that question of fact, and decide it on this application. *Glaser's Case*, 180

26. A Bankruptcy Court,\* in determining the question whether the arrest of a bankrupt is founded on a debt or claim from which his discharge would not release him, as provided by the twenty-sixth section of the Bankruptcy Act, can look only at the papers which were before the State Court, as the foundation of the arrest. *Kimball's Case*, 554

27. Where a bankrupt filed his petition, in which there was no allusion to the fact that he was a member of a firm, although the schedule showed debts contracted by him as member of a firm, and that there were credits due to said firm, and he was adjudicated a bankrupt, and an assignee was duly chosen by the creditors, and the bankrupt then presented a petition to the register, stating that he was a member of a firm, and asking leave to amend his petition and schedules so as to allow the other member of the firm to be joined with him, so that he might be discharged from the debts of the firm, which the register refused:

*Held*, That the register should have granted his petition. The bankrupt had prayed to be discharged from all his debts, and could not be discharged from the debts of the firm until the partner was brought in. *Little's Case*, 186

28. A creditor, who has a security for his debt, may prove his claim for the overplus, without abandoning the security, but must set forth the value of the security, and may vote, on the choice of an assignee, upon such overplus. *Bolton's Case*, 189

29. Where a corporation was organized under the laws of the State of New York, and, in a proceeding instituted by the Attorney-General of the State, and restraining the company and its officers from exercising any of its corporate powers, was declared insolvent, and an order dissolving it and appointing a receiver was made by the Supreme Court of the State, and the receiver took possession of the property of the company, and thereupon a petition in involuntary bankruptcy was filed:

*Held*, That the service of the order to show cause must be made by publication;

That the company had suffered its property to be taken on legal process, with intent to defeat the operation of the Bankruptcy Act. *The Washington Marine Ins. Co.'s Case*, 292

30. Where specifications of objection to a bankrupt's discharge had been filed, and the creditors then moved for leave to take testimony, which motion was opposed, on the ground that the ground of objection alleged was an assignment made by the firm, of which the bankrupt was then a member, before the passage of the Bankruptcy Act, and consequently not within the meaning of the twenty-ninth section of the Act:

*Held*, That the specifications not only alleged such assignment, and that it was fraudulent, but also alleged that the property had remained in the possession of some of the assignors ever since the assignment, and that this was done with the knowledge and assent of the bankrupt;

That the court would not, on such a motion, pass upon the question whether

such a state of facts, if proved, would amount to a fraud under the twenty-ninth section of the Act;

That leave to take evidence would be granted. *Moore's Case*, 325

31. Where specifications of objection to a bankrupt's discharge had been filed, which were too vague to be triable, and no application was made to amend them, and a discharge was granted, and the creditor, about a month afterward, applied, on petition, to have the discharge set aside, and for leave to file amended specifications:

*Held*, That the creditor was chargeable with laches. *McIntire's Case*, 345

32. Where a bankrupt filed a petition in bankruptcy in the Southern District of New York, not averring any place of residence, and, on his examination, it appeared that he resided with his father, in New Jersey, and had done so since he came from Chicago, four years previous; that he had been engaged in looking after a private matter, with a view to returning to Chicago, and that, for about six months back, he had been keeping books for a firm in New York city, and, thereupon, the register declined to make an adjudication of bankruptcy, as having no jurisdiction of the case;

*Held*, That the register's decision was correct. *Magie's Case*, 369

33. Where a bankrupt did not reside in the Southern District of New York during the next six months preceding the filing of his petition, but, before his insolvency, had been in business in New York city, and had, during the whole of the said six months, carried on business in New York city as the agent and attorney of his brother, in buying and selling merchandise, keeping an office for that purpose with his brother's name upon the sign:

*Held*, That the petition in bankruptcy was properly filed in the Southern District of New York. *Baily's Case*, 437

34. Where a merchant, who had resided in New York city for more than twenty years, failed in business, sold his residence in that city, and removed his family to New Jersey, and

they thereafter resided there upon some property belonging to his wife, while he engaged as a clerk with his successors in business, and continued so till the filing of his petition in bankruptcy, two years after:

*Held*, That his petition was properly filed in the Southern District of New York. *Belcher's Case*, 468

35. Where creditors were required to show cause on a certain day, why a bankrupt should not be discharged, and on that day creditors appeared, and the proceedings on the order were adjourned till a subsequent day:

*Held*, That the ten days, within which specifications of objections to the discharge were to be filed, dated from the adjourned day. *Tallman's Case*, 404

36. Where creditors opposed the discharge of a bankrupt, on the ground that he had procured the assent of certain creditors to his discharge by a pecuniary obligation, and the evidence showed that he had paid to the counsel for those creditors, their fees, for services rendered in the matter, amounting to \$20, but it also appeared that those creditors had announced that they would not oppose the discharge, before any thing whatever was said about his paying their counsel fees, and that such payment was not made a condition of their withdrawing further opposition:

*Held*, That the burden of proof was upon the opposing creditors, and the proof did not sustain the specification. *Mawson's Case*, 412

37. Where a creditor, who resided out of the district, had proved his debt in the proceedings, and an order was made that he appear before the register and be examined touching his debt:

*Held*, That, in case of his disobedience, the court could strike out his claim;

That, if he could not personally attend, to be examined in the district, without hardship, the court would provide for his being examined before a register in the district of his residence. *Kyler's Case*, 414

38. Where an execution had been issued on a judgment against a bankrupt, and

a levy made under it, and thereupon, on the filing of a petition in bankruptcy by the judgment debtor, an injunction was issued restraining proceedings on the execution, and thereafter a motion was made to dissolve the injunction, on which the bankrupt produced affidavits to show that he had no interest whatever in the property levied on:

*Held*, That, as the assignee, though notified of the proceedings, had taken no steps to acquire possession of the property, and as it did not appear that the proceedings of the creditor under the execution would affect any one who was entitled to the protection of the court under the Bankruptcy Act, the injunction would be dissolved. *Olcott's Case*, 443

39. Where an order was obtained for the examination of a bankrupt and his wife, proceedings on which order were adjourned several times, during which time the bankrupt filed a petition for discharge, and obtained an order to show cause, but nothing was done on the return day of that order, but objections were afterward filed, and thereupon, on the day to which the examination had been adjourned, the bankrupt objected to being examined on the ground that he had applied for his discharge, and the time to file objections to the discharge had expired:

*Held*, That the adjournment, without day, of the proceedings under the petition for discharge, terminated those proceedings, unless a new order was issued;

That the objections to the discharge might stand as properly filed;

That the time to examine witnesses had not expired;

That the time to file objections should be kept open by adjournments of any order to show cause, until a full opportunity for the examination of the bankrupt and his wife, and other witnesses, had been given. *Seckendorff's Case*, 462

40. Copartnership debts may be proved in proceedings instituted by a single partner, on an individual petition, whether there are any assets of the copartnership or not. *Frear's Case*, 467

41. Where a petition in involuntary

bankruptcy alleged that the bankrupt had concealed himself to avoid the service of legal process, &c., as provided in the thirty-ninth section of the Bankruptcy Act, and the debtor demanded a trial by jury:

*Held*, That, on such trial, notwithstanding the provisions of the forty-first section of the Bankruptcy Act, the creditor was called upon to prove the facts alleged in his petition. *Hop-pock's Case*, 478

42. An order for the examination of the debtor in proceedings supplemental to execution, under § 292 of the New York Code, is "legal process," within the meaning of the thirty-ninth section of the Bankruptcy Act. *id.*

43. Where, in bankruptcy proceedings, a creditor, claiming to hold collaterals as security for an indebtedness of the bankrupts, applied for an order to sell the same, under the twentieth section of the Bankruptcy Act, which was opposed by the assignee in bankruptcy, on the ground that the creditor had not proved his debt, as required by the twenty-second section of the Act:

*Held*, That the creditor could substantiate his claim against the bankrupts, so far as to comply with the requirements of the twenty-second section, without previously ascertaining the value of the securities which he held;

That, as the creditor's right to hold the collaterals was dependent upon his ability to show himself to be a creditor, no permission to sell the collaterals could be granted until his right to sell them was shown, as required by the twenty-second section of the Act. *Bigelow's Case*, 480

44. Where, previous to the passage of the Bankruptcy Act, an attachment had been issued out of the Supreme Court of the State of New York against the property of H., who made a motion to set aside the attachment, which was denied, and he appealed from the order denying his motion to the general term of the court, but the plaintiffs in the suit in the mean time proceeded to judgment and execution, under which funds levied on under the attachment had been paid to the sheriff, and by him paid to the judgment

creditor, so that, at the time of the passage of the Bankruptcy Act, no proceeding was pending in that suit except the appeal from the order above mentioned, and thereafter the judgment debtor filed his petition in bankruptcy and obtained an order from the Bankruptcy Court that the creditors show cause why they should not be restrained from enforcing their claim, with a stay of proceedings meantime, and before the order to show cause was returnable, the appeal in the State Court above referred to was called in its order and dismissed by the plaintiffs' attorney, he having had notice of the stay granted by the Bankruptcy Court, and a motion was thereupon made for an attachment against the judgment creditor and his attorney for disobedience of the stay:

*Held*, That as that appeal, if successful, would not have affected the judgment which had been recovered against the bankrupt, or replace the money which had been paid to the creditor, or give the assignee in bankruptcy any right which he would not otherwise possess, the dismissal of the appeal could not be said to be a violation of the order of this court forbidding proceedings to enforce the plaintiff's claim. *Hirsch's Case*, 494

45. In proceedings in involuntary bankruptcy, no replication is necessary to the denial by the debtors, according to Form No. 61, of the allegations of the petition. *Dunham & Orr's Case*, 488

46. Where an application was made to a register verbally, by a creditor who had proved his debt, for an order for the examination of the bankrupt, and the register held that the application was insufficient:

*Held*, That such application ought to have been made on petition or affidavit, duly verified, showing good cause for the granting of the order. *Adams' Case*, 508

47. Where property had been levied on by the sheriff as the property of D., and was duly taken from his possession in a suit of claim and delivery brought in a State Court by other parties who claimed to own it, and who gave the usual undertaking for its return, if such return was adjudged,

and in due course of such suit it was delivered to the plaintiffs, and a warrant in bankruptcy having been issued in proceedings against D., the marshal, under such warrant, took the property from the plaintiffs' possession, and delivered it to the assignee in bankruptcy, and they applied on affidavits for an order directing the assignee to deliver it back to them:

*Held*, That the case was not one of any conflict between the marshal and the officers of the State Court;

That the remedy of the parties was by a suit against the marshal or the assignee, or by bill in equity or petition;

That the motion must be denied, but that the assignee should make no disposal of the property for ten days, to enable the parties to take proceedings to protect themselves. *Davidson's Case*, 506

48. Where a proof of debt was filed, the debt being for unliquidated damages, and the creditor made no application to have the amount fixed by an assessment, and the bankrupt objected that the debt was not duly proved:

*Held*, That the objection was well taken, and that the court was not called on to order an assessment of damages, unless the creditor applied for it. *Clough's Case*, 508

49. Where creditors had filed proof of debt in a bankruptcy proceeding, alleging that the debt was contracted by fraud, and, on the examination of the bankrupt, proposed to inquire as to the facts constituting the alleged fraud:

*Held*, That the inquiry was irrelevant. *Wright's Case*, 509

50. After the examination of a bankrupt has commenced under an order applied for by the assignee, the order will not be vacated, because it was not applied for on affidavits. *McBrien's Case*, 513

See BANKRUPTCY.

COSTS, 1, 2.

## S

### SALVAGE.

1. Where the libellant, who owned some blocks, let them to parties who were endeavoring to get off a wrecked ves-



sel which they had bought, at Nassau, N. P., to be used in getting the vessel off, at so much a day, the vessel to be responsible for the hire and for the safe return of the blocks:

*Held*, That he had no claim to recover, as a salvor, the price agreed upon, or for the loss of the blocks, either *in personam* against the parties who owned the wreck, or against property saved from her;

That the clause making the vessel responsible for the blocks and for their hire, did not create any hypothecation of her which a court of admiralty can enforce. *Squire v. One Hundred Tons of Iron, &c., and Walter Rahming et al.*, 21

2. Where a railway company received freight in New York, which must be carried to New Jersey to be put on the railroad trains, and had made a contract with one A. to carry such freight from a dock in the East River to the station in Jersey City, A. agreeing to assume the risk of the transportation across the river, and a barge belonging to the company, loaded with such freight, was transporting it across the river, under the direction of A. or his employees, the barge, with another barge, being towed by a steamboat, and the hawser parted, and the one barge was left to drift, while the steamboat took care of the other; and while she was so drifting, a large field of ice came up the river, and carried her along with it in such a direction that the barge was in imminent danger of being crushed between the ice and a pier above, and thereupon a steam-tug, on the call of those on board the barge, went to her, and pulled her out of the ice, and got her into one of the slips, till the field drifted by, the value of the barge and cargo being from \$30,000 to \$45,000, and of the tug \$10,000, and the service occupying about half an hour:

*Held*, That the service was a salvage service;

That the railway company were personally liable for the salvage;

That \$500 was a reasonable salvage, besides \$50 for injury to a hawser. *Seaman v. The Erie Railway Co.*, 128

8. Labor in unloading the cargo of a ship, which is on fire and in danger of

destruction, attended with danger to life, and of unusual severity by reason of the danger to the ship, is not simple stevedore's service, and would be ground for sustaining an action in admiralty to recover compensation for it.

The contract to render such services is none the less a maritime contract, because the compensation did not depend on the result. *The Circassian*, 171

4. Where a bark bound to New York, which had lost her rudder in a gale, was fallen in with, off the New Jersey coast, by a brig bound to Boston, which took off from the bark the captain's wife and family and a sick sailor, and agreed to keep by her, and the brig accordingly kept in company of the bark for six days, at times towing her, in the course of which the brig lost two hawsers and an anchor, and her master had his leg and two fingers broken by the towing hawser, the command thus devolving on the mate; and on the sixth day they made land, which turned out to be Absecom, and thereupon, though the wind and weather were favorable for keeping on, the mate ordered the hawser, by which he was towing the bark, to be cast off, and directed the bark to anchor, and she lay at anchor all night; and the next morning, before she came back to the bark, the latter engaged a tug to tow her to New York; the bark and the cargo being worth \$70,000 or \$80,000.

*Held*, That the case was clearly one of meritorious salvage service on the part of the brig;

That the same law which gives to salvors a reward exceeding any value of the labor bestowed, exacts of them all diligence, and is careful to mark any relaxation of that anxious solicitude for the safety of a vessel in distress, the encouragement of which is the object of all salvage reward;

That the action of the mate in not keeping on with the vessels when off Absecom, but anchoring the bark, was a mistake;

That the court would allow twenty per cent. of the value of the bark and her cargo as salvage, less \$3,500, deducted on account of such mistake;

That the court would allow to the owners of the brig the expenses in-

curred in performing the salvage, and one-half the remainder, by reason of the increased hazard to their vessel in consequence of the disabling of the master;

That the master was also entitled to a liberal portion by reason of his injuries, and that the mate's share must be diminished in consequence of his mistake. *The John G. Paint and her Cargo*, 174

5. Where a tow-boat, while towing a vessel, saw another vessel on fire at a wharf, and went to her, and, with a steam-pump, helped to put the fire out, being delayed in all from three to four hours, and, about six weeks afterward, without any notice to the owner of the vessel saved, the owner of the tow-boat filed a libel for himself alone, claiming a salvage of seventy-five *per cent.* of the value of the vessel saved:

*Held*, That, as the owner of the tow-boat was not personally present at the service, there could be no award of salvage remuneration to him; but, as owner, he was entitled to an equitable compensation for the use of his vessel;

That, as the usual compensation for her services in towing was \$10 an hour, and as she gave the use of her steam-pump, the sum of \$150 was sufficient compensation;

That, under the circumstances, the award would be without costs. *The Jack Jewett*, 464

6. Where a libel, claiming \$1,000 as salvage, for service rendered by a steam-tug in towing a schooner away from a slip where there was a fire, was filed by the owner of the tug, who was not personally present when the service was rendered:

*Held*, That the case was not one of salvage, but that the libellant was entitled to reasonable compensation for the use of his vessel. *The Arlington*, 511

It appearing that the service occupied but two or three hours, that another vessel was towed out at the same time, that the steam-tug was not diverted from any other occupation, that her usual compensation was from \$10 to \$15 an hour, and that the master of

the schooner had refused to pay more than \$50:

*Held*, That that sum was sufficient, and that the libellants should recover that sum without costs. That, if the \$50 had been tendered or brought into Court, the Court would have awarded costs to the claimants. *id.*

See BILL OF LADING, 2.  
BOTTOMRY, 1.

#### SEAMEN'S WAGES.

1. Where seamen served a few days on board a vessel in the port of New York, but did not sign shipping articles, and were paid for the time they served and were discharged, and left the vessel without objection, but libelled the vessel to recover damages for the breaking up of a voyage for which, as they alleged, they had been hired, and process was issued in their favor against the vessel without their giving security for costs, and the claimants applied for an order that they file security for costs:

*Held*, That their claim was not a claim for wages, within the meaning of Rule 45 of this court, and that, therefore, they must file security for costs. *The Caroline and Cornelia*, 105

2. Where a seaman shipped in New York for a voyage to Tampico and back, and, on the voyage back, the vessel put in at Key West for repairs, and, when she was ready to sail, he was not to be found, having gone ashore, without leave, to get some articles belonging to the vessel, which he had previously taken ashore to be washed, and the master shipped another man in his place and sailed without him, and he afterward came to New York, brought the articles to the vessel, and demanded his wages:

*Held*, That, on the facts, the libellant had no intention of deserting the vessel, and did not desert, so as to incur a forfeiture of his wages under the twenty-fifth section of the Act of August 18th, 1856.

That, as neither the name of the seaman, nor the fact that he was absent without leave, were entered in the log-book, the libellant had not forfeited his wages under the fifth section of the Act of July 20th, 1790. *The Catawanteak*, 189

3. Where a libel was filed for seaman's wages, and the answer set up that the libellant had been paid in full before suit brought, and had released the vessel and her master and owners from all claim by a release under seal, and the libellant excepted to the answer because the date of the release was not set forth, nor the time when it was made, nor the consideration for which it was given:

*Held*, That the defence was payment, and the release was only evidence of it, and it was not necessary to state its date or consideration, or when it was given. *The Western Metropolis*, 212

## SHERIFF.

*See* LEVY.

LIEN, 9.

PRACTICE IN BANKRUPTCY, 89.

## SUNDAY LAW.

*See* COLLISION, 3.

## T

## TOWBOAT AND TOW.

Where a canal-boat was taken in tow, with other boats, by a steamboat, at Albany, to be towed to the foot of North Moore street, in the city of New York, and, on their arrival there, the steamboat ran in near the dock to drop off the canal-boat, and signalled her to drop off, which she failed to do, and the steamboat kept on with her, there being many vessels at anchor in the harbor, leaving only a narrow channel near the piers, down which the tow passed, till near the Battery, when, owing to the sudden anchoring of two vessels ahead, the steamboat was compelled to stop, and the canal-boat was carried, by a strong northeast wind and an ebb tide, against pier 2, North river, and sunk, and the owner of the cargo filed a libel against the steamboat to recover the damages:

*Held*, That the Court of Admiralty had jurisdiction of the case as one of a tort committed on navigable waters, even though both vessels were navigating between ports of the same State;

That the duty of the steamboat not to injure the canal-boat did not arise out of the towage contract, but was imposed by the law, and she was liable in the Admiralty for negligent navigation, amounting to a breach of such duty;

That that duty was the same after the boats had passed North Moore street as before;

That the steamboat was guilty of negligence in navigating through the anchored vessels in such a narrow channel, instead of going out into the more open part of the harbor. The sudden anchoring of the vessels ahead of her was a circumstance which she should have anticipated. *The Brooklyn*, 547

*See* COLLISION, 5, 7, 20.

SALVAGE, 5, 6.

## U

## UNITED STATES OFFICER.

1. A receiver of a national bank, appointed under the thirty-first section of the National Banking Act (13 *Stats. at Large*, p. 99), is an officer of the United States;

This court, therefore, has jurisdiction of an action at common law, brought by such receiver (*Act of March 3d, 1816, sec. 4*), to collect a claim which was due to the bank at the time of his appointment. *Platt, Rec'r, &c., v. Beach*, 303

2. A clerk, appointed by the direction and with the approbation of the Secretary of the Treasury, for the fractional currency counter of the Treasury Department, at Louisville, is an officer of the United States, within the meaning of the Constitution of the United States, and of the statutes of the United States in regard to officers charged with the safe keeping of the public money. *The U. S. v. Bloomgart*, 356

## USAGE.

*See* BILL OF LADING, 1.

## W

## WITNESS.

1. A witness in bankruptcy proceedings cannot take the opinion of the judge, on a certificate by a register, or be represented by counsel, except in a proceeding against him for contempt. *Kredenberg's Case*, 133

2. The wife of a bankrupt, attending under an order, and being examined as a witness, is entitled to witness and travel fees, calculated according to the third section of the fee bill Act of February 26th, 1853. *Griffin's Case*, 209

If a witness in bankruptcy proceedings is, by the adjournments of the examination, obliged to attend at intervals, and it is reasonable for him to return home during the intervals, he is entitled to travel fees, at five cents a mile, for going and returning each time, and to \$1.50 for each day's attendance. *id.*

8. The fees of a witness must be paid or

tendered him at the time of the service of the summons or subpoena.

If there is an adjournment, he is entitled to be paid his attendance fee for the adjourned day, and travel fees, if it is reasonable for him to return home.

If the fees are not paid and the witness attends, the fees are to be collected as in ordinary actions. *id.*

4. A bankrupt under examination as a witness, has no absolute right to consult with his counsel respecting the answer to be made to a question propounded to him, and to put in, as such answer, an answer prepared by such counsel, as the result of such consultation; but he may advise with his counsel concerning his answers when the register can see cause therefor. *Judson's Case*, 210
5. A creditor is not entitled to witness fees for attendance under an order that he be examined as to his debt. *Kyle's Case*, 414

See ARREAR 2.

BANKRUPTCY, 11.

PRACTICE IN BANKRUPTCY, 12.

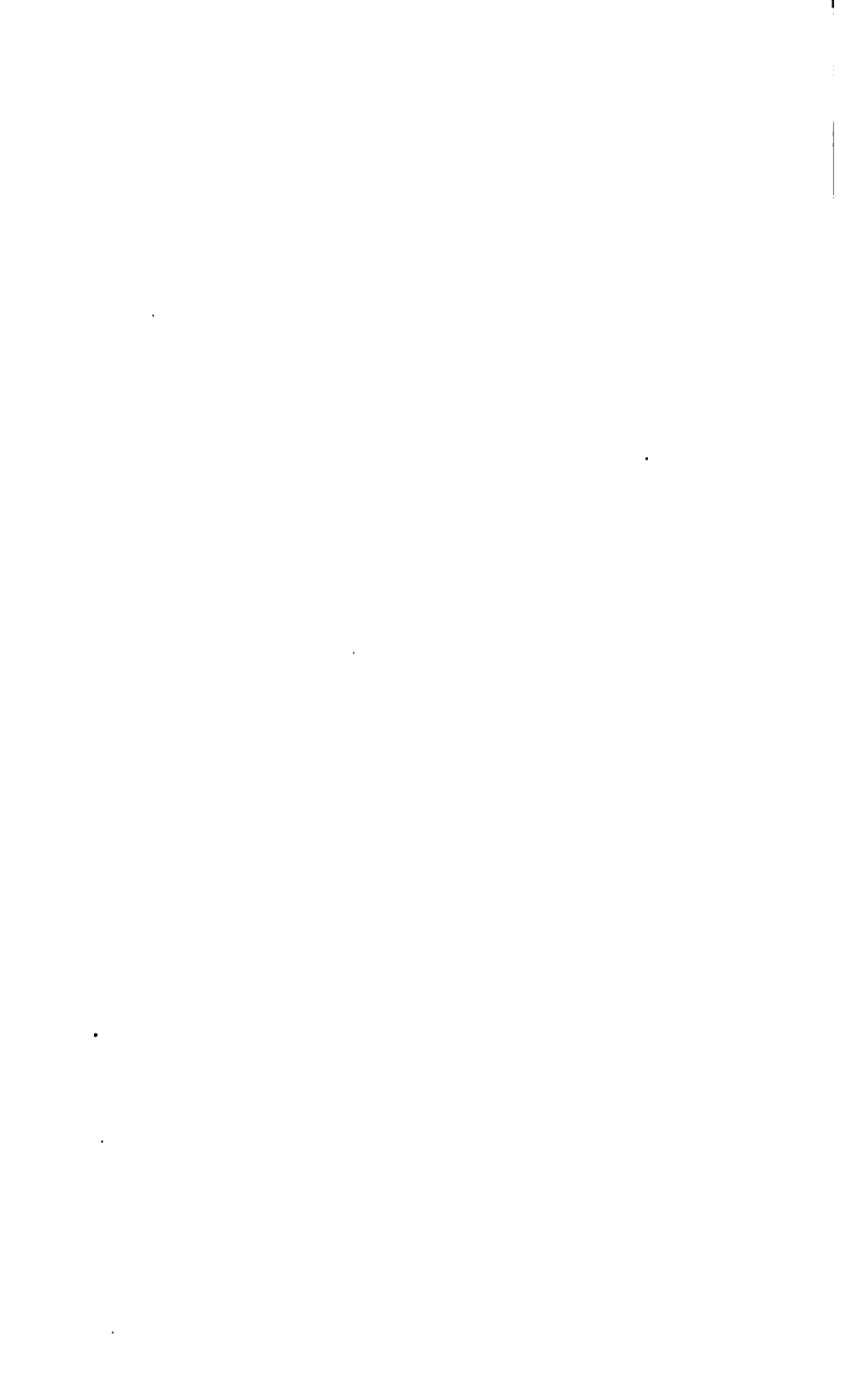




















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